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IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

KAY T. NUNNALLY, INDIVIDUALLY
AND ON BEHALF OF ALL WRONGFUL
DEATH BENEFICIARIES OF JOSEPH
LEE NUNNALLY, DECEASED PLAINTIFF

V. CIVIL ACTION NO. CV92-270-CD

R. J. REYNOLDS TOBACCO
COMPANY AND BASIC FOODS, INC. DEFENDANTS

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DATE: July 5, 2000

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(Time Noted: 8:33 a.m.)

JUDGE CARLSON: Good morning. Hope everybody had a good 4th of July. Just for the record, I'll tell you I had a brief conference with the lawyers as far as procedure. I know there's a little more of the deposition of Dr. Rodgman to be read to the jury. And then at some point after another a live witness or two, I know -- I understand that Dr. Teague will be called by way of deposition. And there will be objections to deal with on Dr. Teague's testimony. So let's try to work through that as best we can.

What would be the -- who wants to start it up as far as the --

MR. ALDEN: I might as well, Your Honor. Our first objection would come at tab 7, and frankly, it's just --

JUDGE CARLSON: Tab 7?

MR. ALDEN: Correct. Here they're talking about a literature survey that Dr. Teague prepared in 1953. Our sole objection to this -- and I think it's been overruled already -- is that it's not relevant because it's so distant from when Dr. -- from when Mr. Nunnally started smoking. And it goes to the issue of only of what we knew and

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when we knew it. I think you've already ruled on that.

JUDGE CARLSON: I'll be consistent with the ruling, so overrule that particular objection.

MR. ALDEN: Your Honor, just one point of procedure. I'm assuming that this transcript we're making here is our objections to this objection testimony. There's obviously no need for us to do it when it gets read in, is that correct?

JUDGE CARLSON: As far as preserving the record?

MR. ALDEN: Correct.

JUDGE CARLSON: The objections here will suffice as far as observing the record to show this Defendant would objected to this testimony.

MR. ALDEN: Thank you, Your Honor. That was our understanding. Going to tab 8, we have no objection until you get to page 80. Other than our objection to document 668 which is the literature survey you've already overruled.

JUDGE CARLSON: Page 80, line 21?

MR. ALDEN: Correct. There they're

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talking about the TIRC. And as you can TIRC isn't an issue in this case. The conspiracy claim is gone. Dr. Teague knows nothing about it. I think it's irrelevant and shouldn't come in.

JUDGE CARLSON: What's the purpose of offering this, Mr. Merkel?

MR. MERKEL: Your Honor, of course, this is not offering anything about the TIRC except what it is, and the fact that Reynolds was a part of it which he acknowledges in lines 15 to 21, "Do you understand your employer, R. J. Reynolds, was one of the sponsoring members of that committee?" He states, "I believe so, but I stayed as far as away from it because I never liked it in school. My interest was in other things." All we're trying to establish there through him is Reynolds was a part of that committee. This doesn't go into any of his activities or anything else. This is just identification for purposes that may come up later.

JUDGE CARLSON: That's what I was going to ask. How that could pertain to anything that could be relevant, come already into evidence that could come into evidence later on.

MR. MERKEL: That's all. Just identifies Reynolds as being part of that. And I think it will be relevant to stuff that comes in later on, but it's not in this passage or in this deposition.

JUDGE CARLSON: I mean, trying to find out what it's going to be relevant to at all, whether it comes in here or later on, what's it going to be relevant to?

MR. MERKEL: Well, publications and things that they've put out and sponsored, if they become relevant later on, at least it will identify Reynolds as being a part of that organization, Your Honor.

MR. ALDEN: I think those have already been excluded, Your Honor, but maybe I'm wrong.

JUDGE CARLSON: Well --

MR. ALDEN: I think the TIRC publications were expressly the subject of one of the Court's motions in limine.

MR. MERKEL: They are right now. I agree, Your Honor, with that. Obviously, they've got witnesses to put on and things that may open the door to that. And if they do, at least we will through him have identified who that organization is. If nothing else comes in, it's not going to hurt anything either, because nothing else will be there about it.

JUDGE CARLSON: I sustain the objection at this point. If it has to be revisited, it can and if it becomes relevant, I'll --

MR. MERKEL: All right, sir.

MR. ALDEN: I think that would strike from line 21 on 80 to line 23 on 81.

JUDGE CARLSON: Right.

MR. ALDEN: The next objection we would have is at page 90. And this goes to one of the three main documents for the rest of this

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deposition, that they talked to Dr. Teague directly. It reads to Dr. Teague, the crucial role of nicotine, which is -- it's a research planning memo. It's Exhibit 565. I can give you a copy if you don't have one. At the bottom of page 90 is where they first start reading from it, although they don't identify it until somewhere later, about page 93. Could I give you a copy of it, Your Honor?

JUDGE CARLSON: All right. Let me find out exactly what the objection is.

MR. ALDEN: Oh, I'm sorry. Do you need the document?

JUDGE CARLSON: Yes, sir.

MR. ALDEN: This is another of Dr. Teague's "blue sky," as he called them, thinking proposals. It's entitled, "research planning memorandum" which is an informal kind of Reynolds' document. Dr. Teague wrote the -- you have already

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ruled on another one that will come up later, during Dr. Burns' testimony, the one that related to youth smoking.

In this one, he simply takes an idea and plays with it. In fact, that's what he testified to in page 92. "That was a statement, as I recall, in a planning document that I was basically writing to myself, and it set up a premise that you could plan on, true or not. I don't know whether it's true. It doesn't say it's true, just says it may be." Dr. Teague testified at page 98 that he wrote this in what was a formal part of his time and his job in 10 percent free time to do what he wanted to kind of do wild, free form thinking. And he testified that's exactly what this is on page 99. He said it was to stimulate blue sky, off the wall thinking.

There's no evidence that it went to anybody. He doesn't recall giving it to anybody. We don't think it's a business record. This is one of the documents, along with the one you ruled on earlier, that was excluded in "Anderson," the New York state case. Where I gave you the decision on the first day of trial, because it wasn't business record. More importantly, than business record status, just as importantly, the Plaintiffs are

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offering this largely as a discussion for presmokers that occurs on page 4.

Where he's formulating ideas about how one might appeal to presmokers in 1972. I would submit that when we have a smoker who allegedly began in 1960, and by 1972 was already 20. Anything they were planning about the youth for presmokers, as you already ruled in Dr. Burns' testimony, I think, certainly couldn't be relevant to anything done here. Even if they could connect this planning memo to some actual research that was conducted, which I don't think they could do. Or if they could connect it on anything Reynolds actually did in the market, and I don't think they can do that, either. We would submit under Rule 402 or 403, this document, therefore, the testimony about it, is inadmissible.

JUDGE CARLSON: Okay. And this starts at

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page 20, line 21, goes down through page 91, line 21 or -- it goes on down further?

MR. ALDEN: This is lots of pages. I can't tell you right off the top of my head. I have it marked or I tried to sit down last night and mark what they're talking about. But it would go well into the next tab.

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MR. MERKEL: Let me address two things separately. First, as far as the nature of the document, this came from Reynolds. They stored it. It didn't come from Mr. Teague, and that's shown in here. Had a "confidential" label on it. Teague is questioned about this in the parts that we have here. Question: "That was part of your job at Reynolds, wasn't it, as part of your job, they allowed you to do certain research?" "Correct, sure. Of course, they would benefit from that research if it happened to unveil anything that was useful. I think the hope was that it would stimulate blue sky, off the wall thinking. That you would try things that weren't assigned, bread and butter projects." Question: "Again, the ultimate goal was to benefit R. J. Reynolds as well, wasn't it?" "I suppose in a sense, it was."

Over on the next page, Question: "They used the information you generated and other people generated in the research department if they could to their own benefit, correct?" He says, "Well, of course." So there's no question that this is a R. J. Reynolds' document. He was in charge of planning. He describes his job description at the front of some of these memos as being in charge of

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planning memorandum, and that was what this was. It was a planning memorandum.

So as far as it being a Reynolds' document, it was done by Reynolds' employee on Reynolds' subject matter. It was kept in the Reynolds' library. It was marked "confidential" by them. It is one of their documents. And Mr. Teague can now try to characterize it any way he wants to, but it is still unquestionably a Reynolds' document. That is the source of it. And it shows what the guy, who was at that point that was in charge of their research, was thinking what he was aware of and what his ideas were.

Now, what it goes to, it goes to several things, or there are two different document that counsel has talked about. And we might as well address both of them at the same time. One of them goes to the role of nicotine and the addictiveness of it. How they understood it, the extent they knew it was addictive and habit-forming. And habituated the continuing use of a product. It discusses how they dealt with the premise that you had to keep the nicotine level at least to the point of satisfying the customer, or you would lose him. And was, nicotine and tar run pretty much hand in glove as

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we're going to hear in great depth from one of their witnesses later in the day.

And so their use of nicotine to keep

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people using the product certainly shows their appreciation of nicotine. It shows their understanding of customer and consumer use, and we're dealing with it on two fronts. We're dealing with it as far as what Joe Nunnally's negligence and responsibility was. And we would submit there that if they predict exactly the precise use of a product that their consumer is going to make, that that's relevant to whether their consumer was negligent in using their product precisely as they predict he would or as they understood that he would.

This is not a case where we've got a product that's got a warning on it that the says don't put your hand into the machine, or don't try to service when it's operating or something of that sort. Here he did exactly what they knew he would do. He used the product exactly as they intended it to be used. The nicotine had exactly the effect on him that they forecast or predicted that it would have. So all of these things are relevant to the questions of negligence and comparative negligence that go into this. They deal with the company's

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anticipated use by a consumer of its product.

Now, the so-called "youth" portions of this did not go to advertising. They did not go to the Joe Camel, or the Fred Flintstone or the ads that were targeting the youth. What they go to the, Your Honor, is again smoker behavior. They're an in-depth analysis by Teague of what makes people smoke to start with. And that's highly relevant to why Joe Nunnally began smoking at age 8. They go over what makes people continue to smoke after they once started. They discuss that, and that is relevant to why he didn't quit or if he should have quit, if he was negligent for not quitting.

They go to the company's awareness of what its customer or user, consumer, is expected to do with this. And some of the portions of this document talk about the fact that Marlboro and Kool are basically eating their lunch in the beginning smoker market. And that they need to do something to get into this market to capture a greater share of the beginning smokers or in 20 years they're going to be out of business. And they go on to talk about what makes people begin to smoke. And they talk about their fragile egos at that point in time, their in securities, their want to appeal to be in

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the "in group," the popular thing to do.

In other words, they talk about all the psychological reasons that people will begin to smoke. And he then discusses the fact that if you can get them to start for these psychological reasons, then the nicotine will take over, and you'll have them hooked. And physiologically, they'll have to continue to smoke. And they talk about the period of time that they expect them to continue to smoke. And they talk about things that would -- that are, in effect, causing this dependence on cigarettes to continue and to go on. And again, it's their issue of whether Joe Nunnally was guilty of comparative negligence or whether he

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assumed a risk.
And again, if what his behavior is is precisely what they predicted the consumer's behavior to be, and he's doing exactly what 85 or 95 percent of the people that ever smoke do, then that's relevant to whether he's being negligent, or whether he's acting reasonably based on all the facts and circumstances.
This, again, is their scientist, his awareness of the consumer and the product, and how they expect the two to be interplayed. And it's

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absolutely relevant and probative as to whether what he did was expected, was foreseeable, was, in fact, a known. Not an unreasonable action on his part, but what exactly this industry and this particular company predicted would be the behavior of the consuming public with regard to this. So the documents are definitely Reynolds' documents. They're pertinent to a point in time we're talking about, and they're before Nunnally's death in 19 early '70s type documents. He was 20, 19, 20, 21 years of age type situation, I guess 18 to 21 is when these documents were authored. So again, his behavior is at issue, and these predict this behavior.
JUDGE CARLSON: Mr. Alden.
MR. ALDEN: Your Honor, we're not disputing that this came from Reynolds' files or that it's a Reynolds' document. What we're disputing is whether it's a business record within the sense of the rule. And in that sense, I think it clearly isn't. Dr. Teague has testified that he wrote it on what was formally 10 percent of his time to do free form thinking. It doesn't -- and I guess most fundamentally, it doesn't represent research. What it is is Dr. Teague taking an idea, an

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assumption. He says right on page 3 of this the document, "If nicotine is the single unknown of tobacco products." There is absolutely no research in this document. He doesn't say, "We've done tests on smokers and found that their response to nicotine is thus and such." He doesn't say our marketing research shows thus and such. This is a tobacco chemist taking an assumption about nicotine and playing with it.
It doesn't represent any research. It doesn't represent anything other than his personal thoughts that he prepared on his 10 percent of his time that is formally set aside for him to do free form thinking. So in that sense, we think it's both irrelevant and isn't a business record.
I do think that there are differences between -- Mr. Merkel is attempting to lump this with the other research memorandum that you ruled on in Dr. Burns' testimony. I think there are differences between the two. And if you want me to address the second one, I could. The second one is solely directed to you. It is far more subject to Rule 403. It, like this one, contains no actual research. What it is is Dr. Teague, a tobacco chemist, taking a premise and playing with it about

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how they could develop a youth product.
And as we discussed on the first day of trial, Plaintiffs can't show that they the did anything with that. Plaintiffs can't show that they went forward with any product development ideas, and Plaintiffs can't show that they, in fact, put in any kind of product any time after 1972 when this document was written. Moreover, even if they had, by that point Mr. Nunnally was 20. He, according to Plaintiffs, had already been smoking 12 years. So anything he had done from '72 forward, as far as the youth market certainly isn't relevant. More extent this one, they're really offering it because it's an inflammatory document that doesn't have anything to do here. We would say that under 403, it doesn't come in.
JUDGE CARLSON: On the other document directed to youth, where that document referenced?
MR. ALDEN: That document is 569. I assume by now Plaintiffs have the one -- the other one, also, has the factor on the first page. It says "draft" on the first page.
MR. MERKEL: We're talking about the final version of it.
MR. ALDEN: There is no final version of
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569. The correct copy of 569 has the word "draft." There is no version of 569, and 569 is the other document --
JUDGE CARLSON: 569 is the one that you just handed me?
MR. ALDEN: It is. It's Plaintiffs' copy, and I apologize that I don't -- I gave Mr. Merkel a correct copy last night that had the word "draft" on it. You can see it on the first page of text at the bottom, the word draft if you flip the cover page. At the very top, there's something cut off, that's the word draft. For the additional reason that one is not even marked as a final research planning memorandum which is a nonexistent category of document within the normal structure of Reynolds' reports.
JUDGE CARLSON: What's the document number on the first document, the one we've been talking about?
MR. ALDEN: 565. And the second one is 569.
MR. MERKEL: It's not offered, Your Honor, to show that they implemented the plan. It's not offered to show that they directed it at any particular age group or anything else. It's offered
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to show what they expected. What their analysis, and their history and their experience in the industry shows them causes people to begin smoking, what causes them to continue to smoke, and how that interplays with a smokers decision making -- making apparatus. And that's what it's relevant to, is the issue of negligence and the issue of comparative negligence and what they did about it. And it goes to proximate cause of what they would expect a user to do with their product.

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In other words, is it foreseeable that they're going to do the things that Joe Nunnally did with it, and if so, that's one of the direct areas that we have to prove. And this is coming straight from the company's head chemist as to what the situation is. And it's not a matter of whether it was adopted by something else.

Reynolds is charged with the knowledge of their employees. And this shows clearly what this man's knowledge and understanding of the effect of marketing and the effect of a beginning smoker's taste for the product. The fact that it's not a natural craving, that it's an acquired taste. And that you've got to baby them through it by making it more palatable early, so that the nicotine will

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finally take hold, and then it will drive the situation.

MR. ALDEN: Your Honor, could I just say one more thing?

JUDGE CARLSON: All right.

MR. ALDEN: I think Mr. Merkel made an important point in his argument, and that was this is by a tobacco chemist. Dr. Teague's Ph.D. was in chemistry or certainly some physical science if not chemistry. He doesn't know anything about consumer psychology. He doesn't know anything about smoking behavior in the sense of having gone out and done biobehavioral research which Reynolds did, and Dr. Townsend can testify to in the '80s. We did a lot of biobehavioral research in the '80s talking about how smokers smoked.

But that isn't what's in here. What's in here is a tobacco chemist's assumptions about how tobacco -- about how smokers might smoke. And the second thing, if Mr. Merkel isn't offering it to prove that it happened, he's just offering it to prove some general state of knowledge of smoking behavior. Then I would submit that minimal probative value is certainly outweighed by the fact that at least 569 and to a lesser extent 565 talks

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extensively about the hot button issue of youth smoking. It isn't an issue here.

JUDGE CARLSON: As to document 565 and the objections there, and the testimony of Dr. Teague as to that document, I would overrule the objection. But I do want to again look at 569 when we get to that portion of the deposition. Does that take care of all of tab, Mr. Alden?

MR. ALDEN: It takes care of the rest of tab 8. At tab 9, we'd object on page 123 to the testimony by the lawyer that lacks foundation that begins at line 11 through 24.

MR. MERKEL: 123?

MR. ALDEN: Correct.

MR. MERKEL: Beginning at what again?

MR. ALDEN: The question, "The reason it's a happy event," page 123, line 11. There is no answer to that question, either.

MR. MERKEL: The answer is on page 124 at line 7. And then he continues the answer from 9 to 15, and it's simply a question, Your Honor, of what

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he meant by calling this a "happy event." I don't think there's a thing wrong to the question. The witness is attempting to give to the extent he wants to give to it. It's predicated upon Teague's

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description as being a happy event. And he tries -- the lawyer tries to get Teague to agree with him as to why it's a happy event, and Teague responds.

MR. ALDEN: Dr. Teague responds, I don't believe that at all on line 18 on page 123.

JUDGE CARLSON: I'll take out on page 123, starting at line 11, down through line 24.

MR. ALDEN: Okay.

JUDGE CARLSON: And then I will allow it to stay in, starting at line 25, page 123, the question and response going on over to page 124. But I agree the first part should come out.

MR. ALDEN: Your Honor, our next objection would be on 125, they talk about advertising at line 18. Talking about whether we worked to advertise the role of nicotine. That's clearly preempted. That's clearly out of this case, just that one question and answer, 18 to 22 on 125.

MR. MERKEL: This is in -- let's see, 19 --

MR. ALDEN: '72.

MS. MILLER:

JUDGE CARLSON: So you're asking, page 125, line 18 down through --

MR. ALDEN: 22.

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JUDGE CARLSON: -- line 22.

MR. MERKEL: I don't know if that question is limited or pertains to any particular point in time. But it was certainly a pertinent question before 1966 when the label went on the pack. The preemption didn't have anything to do with dates prior to -- to that. So --

MR. ALDEN: Your Honor, they still don't have a warning claim.

JUDGE CARLSON: I'll take it out. I don't think it will add anything, anyway, based on the question and response.

MR. MERKEL: That's 18 to 22?

JUDGE CARLSON: Yes, sir, on page 125.

MR. ALDEN: Your Honor, our next objection would be on page 131. Here Dr. Teague is questioned about a document that I don't think they designated on Sunday before last as one of their exhibits. It's Exhibit 5 -- they do have it in their predesignated exhibits as 559. Can I hand it up, Your Honor?

JUDGE CARLSON: All right. 559?

MR. ALDEN: Correct. This is a marketing department survey. It is addressed to Dr. Teague. He didn't recall seeing it. He really doesn't know

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anything about it, as you can tell from reading on, obviously, the Court can read on. It's talking about cigarette substitutes and a marketing test of those substitutes, and Dr. Teague has no knowledge of that. So on that basis, we'd object.

JUDGE CARLSON: Okay. Starting at line

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10 on page 131 down through how far now?
MR. ALDEN: I think he continues to talk about that through 136. I think it's this -- it's this whole designation from 131 to 136.
MR. MERKEL: And Your Honor, it's simply a marketing research document that was addressed to Dr. Teague. I mean, there's no question about who it went to, and that it was intended for his use. And the fact that he says now 20 years later he remembers it, or doesn't remember it doesn't have anything to do with the relevancy or the appropriateness of the document. If that were the case, no document would ever come in. Every witness would just say, "I don't remember that," and that would be the end of it. Line 23 on page 132 shows where it went.
And in fact, on page 135, line 23, Question, "It's been requested by you, hasn't it, sir?" And he says, "That's what it says. Like I

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say, I have no recollection." But Teague, himself, requested this report from the marketing department, and they sent it back to him after he requested it.
JUDGE CARLSON: On that point, then, I'll overrule the objection as to that particular section of the deposition.
MR. ALDEN: Your Honor, our next objection would be on page 155. They're asking for expert testimony from Dr. Teague at line 2 about what he thinks a "responsible tobacco company." He says, "That's an opinion and how would I know?"
JUDGE CARLSON: 155?
MR. ALDEN: Line 2.
JUDGE CARLSON: Down through how far?
MR. ALDEN: Just through line 9. Well, actually through line 18 and 19, I think.
JUDGE CARLSON: Line 19?
MR. ALDEN: Yeah.
MR. MERKEL: Where is your beginning point?
MR. ALDEN: 155, line 2?
MR. MERKEL: 6?
MR. ALDEN: 155, line 2.
MR. MERKEL: Oh, number 2, okay. And from there down to where?

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JUDGE CARLSON: 19.
MR. MERKEL: Again, Your Honor, I think what a responsible company would do is certainly at issue. And if he wants to pretend to the jury that he doesn't have an opinion and doesn't care, I mean, that's an answer. But I don't think it's, again, a basis to exclude the testimony, because he refuses to answer the question. He says, "I don't want to give an opinion." So the opinion requested is pertinent and relevant. And he just avoids answering it. And I think that -- an answer of that type is indicative of what their research and development and the guy he was -- position he was serving was thinking about the situation at that time.
MR. ALDEN: Your Honor, at the time he's giving this testimony, he's 13 years removed from

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the company.
JUDGE CARLSON: I'll sustain the objection on that part. It will come out.
MR. ALDEN: Your Honor, our next objection would be on page 157, line 6, where the lawyer makes an accusation that lacks foundation about pH manipulation. Which really leads into a large chunk of the next part of the deposition which

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is a discreet issue of pH, ammonia and nicotine manipulation.
The Court's already ruled that absent a showing by the Plaintiff that there's some factual basis for saying that Reynolds manipulated pH and Reynolds added nicotine for the purpose of manipulating pH, that that can't come in. Where we start here is a new exhibit. It's Exhibit 562 -- down at the bottom. It's Exhibit 562. At the start talking about it at the bottom of page 157. Could I hand it up, Your Honor?
JUDGE CARLSON: Yes, sir.
MR. ALDEN: This is something we talked about briefly, at least, during Dr. Rodgman's testimony, when we were going through it. Here we have no evidence from their expert about pH, ammonia or nicotine manipulation. In fact, he expressly denied having any knowledge about that. That's what Dr. Burns testified to both in his deposition and at trial. We have an affidavit from that -- from Dr. Townsend that I can give to the Plaintiffs and I'll give to the Court. Dr. Townsend will be here later to testify. In which Dr. Townsend says unequivocally they didn't add ammonia products to the sale of cigarettes that Mr. Nunnally is alleged

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to have smoked for over 20 years in his smoking history. He also says that according to an analysis, Reynolds has done an analysis that I can also give the Court, if you like, although I apologize, it's a rather lengthy memo.
The pH of Reynolds' Salem cigarettes, the cigarettes that are at issue here. Because that's what Mr. Nunnally allegedly smoked, declined at the time. And if I could point you to the Salem chart, because this is a lengthy document: Here's the pH of Salem 85s which are Salem regulars, and you guys want me to find the chart?
The basic theory that we're talking about here with ammonia and pH is that in the early '70s, there was a call from the public health community to increase the pH of cigarettes so you could get more nicotine per level of tar. On the theory that tar was the bad thing. People smoked for nicotine, so if you gave them more nicotine, they would get less tar.
Reynolds looked at that both in terms of what was happening in the marketplace and in terms of what the public health community was doing. And thought, and experimented and did extensive studying on could you increase the amount of tar per --

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excuse me, could you increase the amount of nicotine per tar to development a "safer" cigarette. That

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didn't happen. They couldn't develop it. And as the chart shows, the sale of cigarettes here, I would submit in you look at the whole document, more generally it didn't happen. The pH of cigarette smoke overtime declined. It varied a little bit year to year.

But as you can see from the chart, yourself, the pH went down. Dr. Townsend has testified that we didn't use ammonia in the product here. And when we did use ammonia, it was only for taste, and it didn't get used in quantities sufficient to effect pH. What we've got here is a red herring issue. What they're trying to do is put in first Dr. Teague's analysis and then a lot of testimony about a pH, ammonia, nicotine. Which is in effect testimony about nicotine manipulation and nicotine spiking that they've already admitted pretrial is not an issue in this case. And if you look at the record to this point in the trial, their expert knows nothing about it. He didn't talk about pH manipulation. He didn't talk about ammonia manipulation. It's simply not an issue in the trial. And certainly given that it didn't happen,

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and we can prove that it didn't happen in the cigarettes at issue here, it shouldn't be allowed in.

MR. MERKEL: Your Honor, it does not go to spiking a cigarette. What it goes to, again, is their understanding of the interrelationships at this point in time, in the early '70s, between nicotine and tar. And what they were trying to do, at least in their laboratory, what they were exploring, what their the premises and theories were about what to do with it. That's the very purpose that this guy Townsend is going to come in here and spend the day with us -- today or tomorrow or whenever he shows up -- is talking about all the wonderful research and all the things they tried and all the money they spent trying to be a responsible company.

Which, in it's relevant, then they're entire thinking about all of these experiments, and these theories and so forth is equally relevant. If he's going to try to take credit for reconstituting tobacco, for expanding tobacco, lowering the tar, for doing all of these things, then their entire process and what they were thinking in this thing, what their chemists believed and what their

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rationale for doing this was in the '70s is wrong. And that's all this is. Nobody's trying to say they spiked a cigarette with adding nicotine from somewhere else. What this is all about is adjusting the nicotine impact of the nicotine that's already there.

And can you, in fact, move the impact up to meet the habituation needs, the habit. And, at the same time, take enough of the tar and stuff out that it might make some difference. This was what was going on in the 1970s. This is what Mr. Teague is doing. And this is what Townsend is in, effect, going to talk to us about, are all the things that

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they did. They've shown the jury charts of all of these different ways that they tried to make a safer cigarette, and that they thought did make a safer cigarette. And part and parcel of that is nicotine versus tar ratios.

And this particular question is can we, by increasing the pH, by putting ammonia on the tobacco leaf, will that free more nicotine so that the impact on the consumer will be greater than the same amount of nicotine would with a lower pH, and all that is is part of the process. That's what we're trying to offer it for.

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That's what Dr. Teague wrote the memo for was to show how those things played with each other, tar versus -- versus nicotine. And if you lower all of that too much, then the -- the habitual user is not going to be satisfied. His craving is not going to be met. We're looking free the nicotine by raising the pH. And unquestionably, they did ammoniate their product. This affidavit says in line, paragraph 7, "Reynolds has used very low levels of ammonia containing compounds since the mid-'70s in some of its products," and then it goes to say to achieve particular flavor characteristics and so forth.

Now, you know may be an issue about what he used it for, but there's no question that they did add ammonia to the tobacco. And if Dr. Teague's memo seems to make the purpose of adding the ammonia different than what Mr. Townsend would now tell us, then all that is is creating a factual controversy between their own witnesses. But there is no question they did add ammonia to the tobacco leaf.

MR. ALDEN: Your Honor, I don't think Dr. Townsend is going to testify about ammonia or pH research. And obviously he did, that would change the base of this objection. And maybe at this

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point, this document would then be admissible. But if you look at what Mr. Merkel just told you, he's telling you that something we looked at, but didn't do is relevant even though we didn't do it because it shows something we knew.

By Mr. Merkel's analysis, anything we did at any point is relevant. I think that's clearly too expansive. Mr. Merkel read the beginning of paragraph 7 of Dr. Townsend's affidavit. But the end of it says, this is really the point here, ammonia is a naturally occurring constituent in tobacco smoke. And Reynolds does use a small amount of ammonia in certain processes. In fact, it is interesting the process they use it in. They call it the KDN process, which is a way of taking unusually high nicotine tobacco and lowering the amount of nicotine into it.

And when you lower the nicotine through use of ammonia in the KDN process, there's a little bit of residual ammonia. That's one of the things Dr. Townsend is talking about here, not a way of increasing nicotine, in fact a way of decreasing nicotine. The other way is in the G7A company constituted sheet where you use it for taste

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characteristics.

But his conclusion is, although it may be possible to increase smoke pH by adding ammonia containing compounds, which what these documents talk about. At the levels that Reynolds uses and has used ammonia know containing compounds in commercial cigarettes, those compounds have not measurably affected smoke pH.

Those charts that I gave you no question about that. The pH has fallen during the very time that they are doing this research, the smoke pH in their cigarettes was falling. If they were adding ammonia for what they're talking about here which was to increase pH, precisely the opposite would have happened. All they're offering this for is to try to bring in the red herring of nicotine manipulation. And they're trying to use, and you heard Mr. Merkel use it, the concept of free nicotine to draw an analogy to free basing cocaine. That's what Plaintiffs have done here. That's what they've done elsewhere.

That's improper, it's unduly prejudicial, and certainly as Dr. Townsend has testified, there's no ammonia in the cigarettes that are at issue here. Here he's talking at paragraph 7 about Reynolds cigarettes general. When he talks about Reynolds

Salem cigarettes, and I apologize if I can't find it right now, he's not at all equivocal. "Reynolds has never used ammonia containing compounds in manufacturing or in processing the tobacco used in its Salem or Salem lights cigarette brands." Thank you, Your Honor.

JUDGE CARLSON: Based on the status of the record, I'm going to sustain the objection. I think that's appropriate an at this point. Let's do this --

MR. MERKEL: What does that deal with, Your Honor, from where to where does that objection go so I can --

JUDGE CARLSON: It starts at line 22 on page 157, I believe.

MR. ALDEN: Your Honor, I could be wrong. But to my eye, it goes through 209. And on page 210, he starts talking about a different but in substance identical document that talks about ammonia. And Mr. Merkel can correct me if I'm wrong, but in my notes last night, I have the testimony really through the rest of this tab talking about either this document, another document that's entitled "ammonia" or the general issue of pH in ammonia.

JUDGE CARLSON: Let's do this, let's go ahead and take a short break. I think, it appears, probably, we have enough to keep the jury busy for a while. So instead of keeping them back there too long, been back there roughly 50 minutes, go ahead and get some work before them and see where we stand. And I think we've got a good bit of courtroom time at this point. And then maybe the lawyers can study it and see what else needs to be

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dealt with on Dr. Teague later on in the morning. Take about a five minute break and then go forward. Do the lawyers agree that we've got a good bit to give to the jury at this point without a break?

MR. ALDEN: I might question your characterization of it, but it's substantial.

JUDGE CARLSON: Sir?

MR. ALDEN: Yes.

JUDGE CARLSON: Let's take a short break, and then we'll go forward.

(A short break was taken.)

MR. ALDEN: Your Honor, should I come up to the witness stand?

JUDGE CARLSON: Yes, sir, that would be fine.

(Jury enters courtroom.)

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JUDGE CARLSON: Good morning, ladies and gentlemen. I hope you had a good long 4th of July weekend, able to relax and enjoy your family. We are ready to go forward. And I know you've been here for at least an hour, some of you longer than that. And I know you got here again to hurry up and wait. But I hope by getting with the lawyers this morning and trying to, again, pare down the evidence and streamline it for you here in the courtroom, and minimize delays that we can now go forward.

And I anticipate during the course of the day, there may be short delays here and there in trying to look at wherever we are. But if you'll bear with us, I think we'll do it through the day pretty good. But since you have had the extended recess since last Friday, of course, need to inquire of you have you had occasion to talk to anybody about the case or has there been any effort of anyone to talk to you about the case, any outside information you gained about the case, anything you need to bring to my attention?

Okay. If not, then, we'll move forward, and as you will recall, last Friday, portions of the deposition of Dr. Rodgman being read to you, and you heard portions offered by the Plaintiff, and now at

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the time we took our recess for the weekend, the Defendant was offering portions of Dr. Rodgman's depositions. So we'll go forward at this time. Mr. Ulmer.

MR. ULMER: Your Honor, we only have like, I think, six or seven pages left.

JUDGE CARLSON: All right, sir.

MR. ULMER: And I'll try to pick up where we were, on page 36, line 4.

(Reading of Dr. Rodgman's deposition continued.)

MR. ALDEN: Last page.

MR. ULMER: Last page? All right.

(Reading of the deposition of Dr. Rodgman continued.)

MR. ULMER: That's the end of that, Your Honor.

JUDGE CARLSON: I understand at the appropriate time, we will need the document marked for the record, as far as portions of the deposition

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that have been read to the jury.
MR. MERKEL: Your Honor, at this time we would offer into evidence Plaintiff's Exhibit 679 and 141 in, both of these are documents that were referred to in Dr. Rodgman's deposition.

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JUDGE CARLSON: All right, sir.
MR. ALDEN: I'm sorry.
MR. ULMER: Have they been ruled upon, Your Honor? Those two documents?
JUDGE CARLSON: I think they were referred to I guess last week during the course of Dr. Rodgman's testimony?
MR. ALDEN: What were the two numbers.
MR. MERKEL: 679 and 141 in. They were the two documents in Dr. Rodgman's deposition that were referred to.
MR. ALDEN: Your Honor, this is 678, and this is the draft of 679. I thought they were offered --
MR. MERKEL: 679 is the one that we're offering.
MR. ALDEN: This is 678. 679 is the one that's not a draft.
MR. MERKEL: 679 is what we would offer.
MR. ALDEN: We have no further objections other than the ones we stated previously, Your Honor.
JUDGE CARLSON: All right, sir, be marked and received into evidence. Objection is noted.
(Exhibit 141 (N) marked for

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identification and entered into evidence.)
(Exhibit 679 marked for identification and entered into evidence.)
JUDGE CARLSON: Again, just to make certain, if it hasn't been marked yet, I understand that the attorneys will get marked for the record the portions of the deposition read to the jury, both what the Plaintiff offered and the Defendant offered.
MR. ALDEN: We're doing that, Your Honor.
JUDGE CARLSON: Okay.
MR. MERKEL: Call at this time, Your Honor, Larry Gideon.

LARRY GIDEON,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MERKEL:

Q. Good morning, Mr. Gideon.
A. Good morning.
Q. Would you identify yourself, please, for the record and the jury?
A. I'm Larry Noble Gideon, Sr.
Q. And how old are you, Mr. Gideon?
A. 52.
Q. And you were born what year?

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A. 1948.
Q. That would have made you four years older, approximately, than Joe Nunnally?
A. That's correct.
Q. And tell the jury, please, where you

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live.
A. I live at [DELETED].

Q. And how long have you been in the [DELETED] area?
A. Since 1959.
Q. And did you know Joe Nunnally during his lifetime?
A. Yes, sir, I did.
Q. Explain to the jury how you knew Joe, what your relationship to him was and when you first met him, please.
A. I first met Joe in 1959. His family moved from south Memphis the same year that we moved here from Alabama. His dad was affiliated with the railway express company with the railroads. My father was a railroader. They became -- they moved to Mississippi near the Horn Lake area and opened up an ice cream stand that they leased, called, Ropes Ice Cream Stand. It was the only gathering place we

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had in the neighborhood. The school we all went to probably had 400 students for the whole school. They had 1st through 12th grades there. Joe's oldest brother, Guyton, and I graduated together. We went from the 6th grade through 12th grade together.
Q. Would it be fair to say you were really more of a friend of Guyton than you were of Joe at that point in time?
A. In early years, yes. Guyton and I were closer in age. You know, if you remember, when you're a kid and you're in 6th grade, you didn't mess around with people in the 2nd grade much. So primarily during the early years, Guyton and I were the closest of the two -- of the three boys.
Q. Did there reach a time later on when you became more familiar with Joe and became a better friend of Joe's?
A. Yes, it was. It was several years later. As you get older, age doesn't seem to make that much difference anymore. Probably about 1978, '79, I became reacquainted with Joe. He was running for a political office in [DELETED] or in the area. I think he was running for a City Councilman or Board of Alderman type deposition there. And he

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had approached -- and I had known him all these years, and we had spoken over these years. But he had approached me as a member of the J.C.s wanting to use the J.C. building as a venue for a political rally type thing. That's when I first began to know who Joe was. And I know that, at that time, he only had one child and did not know who his sister -- who his wife was or anything.
His wife later became my sister-in-law because I married her sister about three years later.
Q. So that would have been when? When did you marry Kay Nunnally's sister?
A. In 1982.
Q. So at that point, I presume, from then forward you and Joe had more reason to be around

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each other more frequently?
A. Actually, it started before that. Because Joe's the one that introduced me to my wife. Joe and several of his other friends owned a thespian theater group. And I became involved with them because they began using the J.C. building as a venue to produce their plays. And I became involved with Joe probably close to a year before I actually married my wife.

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It was during the production of one of the first plays that I was involved in where he introduced me to my now wife who was -- he said you need to check out my wife's sister. And so I did, and she and I married six or eight months later.
Q. Were you involved in the theater thing --
A. Yes.
Q. -- to any extent also?
A. Yes, as an actor, as a workman type thing.
Q. Tell the jury, if you would, Mr. Gideon, a little bit about Joe. What kind of a person he was, and what you came to appreciate about him as you got to know him again, reacquainted in 1979 or so.
A. One thing I found out about Joe, immediately, if he became your friend, he was your friend for life. He was a -- I began to notice what a strong family man he was, and what he cared -- how much he cared for his wife and his children. And again, how much he cared for the friends, the people that had been close to him. And I was just fortunate enough to enter his life at a later time, once he had established most of his on going friendships and became one of the ones who got into

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this close circle of friends with him.
He was one who liked to do -- do things with the family. This family had always been close, Joy and her sisters and Kay. And I remember it's like getting together on weekends and going to the lake and teaching the children how to water ski. And taking our boats down and just riding around and spending time together with our families on weekends.
Q. Was this something that your family and his family did frequently after you became involved in the family?
A. Yes, it was. The summertime was a really great time. Joe had -- Joe and Kay put in a pool. And I helped Joe build his deck around the pool and everything, and we went to the lake pretty regularly on Sundays. That was one of the things we all looked forward to is getting away on Sunday afternoons or Sunday mornings. And we'd all go to the lake, spend the day at the lake with the kids, picnicking and things. And you know, we -- it was just something we enjoyed being with our family and being with each other.
Q. Are you a smoker, Mr. Gideon?
A. Yes, I am.

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Q. When did you take up the habit?

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A. In 1968. I was about 20-years-old when I began.
Q. And how long -- have you continuously smoked since that time?
A. Mostly. I smoked continuously from 1968 until 1993. At that time, I had a heart attack, had to have open heart surgery. And was advised by my doctor to quit. I have tried dozens of times to completely give it up. I have always been lured back to it.
Q. What brings you back to it?
A. My opinion is I'm addicted to it.
MR. ULMER: Your Honor, we object to any opinion testimony by the witness on the basis of lack of qualifications.
JUDGE CARLSON: As to that particular question and response, I'd overrule the objection.
Q. (By Mr. Merkel) What you're calling addiction, without regard to whether that term may be defined by somebody else in the same way you do, explain to the jury what you're talking about, Mr. Gideon, what you've just termed "addiction," what are you talking about?
A. I have a need for the rush, I guess that

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you would call it, that I get from the nicotine. It's something I can put down for a few days. Once I get around it again, the urge is to the point that I feel I have to have it. Thinking well -- I try telling myself it's not going to be good. It's not going to taste good, it's not good for me, and I know it's not good for me.
The -- when I pick it up, it really does taste good again. It's a rush that I get, kind of an euphoria, more or less. That -- I don't know what to call it other than fact maybe it's like something that gives you courage. When you have the nicotine in your system you feel that there's maybe things you can do that you didn't normally, you know, do, or weren't ready to tackle at that point.
Q. How long is the longest that you have gone without smoking since your doctor advised you to quit?
A. Probably as long as six weeks at the most.
Q. And have you also tried the cut down the number of the quantity --
A. Yes.
Q. -- of the cigarettes you smoke?
A. Yes.

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Q. How does that work?
A. Better than giving it up cold turkey. Cutting down to, at work, four or five a day.
Q. And have you been able to maintain that, or do you go back from that to --
A. Sometimes it increases. It has never gotten back to the point of a pack a day or two packs a day or anything like that. But not even as much as a pack a day, but to put it down altogether, I have not been able to do it.
Q. Why did you start smoking, Mr. Gideon?
A. I was going to school, working eight

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hours a day and going to school, going to college, working 11:00 to 7:00 at the railroad, all of my friends smoked. I began trying it, and other than the fact thinking it was cool, you know, I don't remember why, initially, I would have picked it up, other than thinking it was cool and all my buddies did it, too.

Q. What was cool about it? What made you think it was cool?

A. Probably something like the Marlboro ad or something like this.

MR. ULMER: Your Honor, we object to this. This case is not the witness. It's about Joe Nunnally, and this is not relevant. We object.

JUDGE CARLSON: I sustain that particular question.

Q. (By Mr. Merkel) Mr. Gideon, did Joe Nunnally smoke when you became reacquainted with him in 1979 or so?

A. Yes, he did.

Q. How often did he smoke? How much did he smoke? What was the extent of his habit, would you say?

A. Two packs or better a day.

Q. And what brand did he smoke?

A. Salems.

Q. Are you aware of Joe Nunnally ever trying to quit prior to being diagnosed with cancer?

A. No, I'm not.

Q. What percentage of your friends, yours and his acquaintances, back in the mid '60s and early '60s on up through your graduation from high school, what percentage of your acquaintances and friends smoked?

A. In high school, not that many. It became more prevalent in later years. We saw it more in later years. Even though my high school had a smoking room for the boys and a smoking room for the girls, if you brought permission from home saying you could smoke at school, you were allowed to smoke at school.

Q. What high school was that?

A. Horn Lake.

Q. And is that the same school Mr. Nunnally attended?

A. Yes, it was.

Q. These so-called smoking rooms or whatever, where were they located?

A. They were located in an existing men's room and existing lady's room that were attached to our old gym which had become the library at this point.

Q. Did you become aware at some point, Mr. Gideon, that Joe Nunnally had been diagnosed with cancer?

A. When he told me on or his wife told us during the Thanksgiving weekend. Trying to remember the year, I do not remember the year, probably 1988, I guess it was somewhere in that --

Q. I believe that's correct.

A. Does that sound right?

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Q. Can you tell us about the impact that that knowledge had on Mr. Nunnally and his family as you observed it?

A. I guess any time that you're told you've got cancer, it's devastating to the -- to the -- to yourself. I have never seen anyone that was told they had cancer that didn't get emotional about it. It may have been for a short period of time or a long period of time. I know that I got emotional when I found out.

As far as the effect that it had on Joe, he was devastated. But he had faith that, you know, the doctors the could do something for him. And he maintained that throughout most of his illness.

Q. As far as his activities, did he try to continue those to the extent he physically could following the diagnosis?

A. Yes, he did, yes, he did. He tried to stay as involved, especially in his children's lives, as he could. He was -- he worked some after his diagnosis. He just -- it seemed that he never really got his strength back again after his first surgery.

Q. After he ultimately passed away, Mr. Gideon, and I think that was up in 1999.

A. '89?

Q. I mean '89, I'm sorry. Tell us if -- if you would, what -- how his wife, in particular, coped with the situation and tried to continue raising the family after his death.

A. Kay was a very independent woman. She was bound and determined that, as a one parent, she was going to raise four children. From what I have seen, she has done a remarkable job of that over the last 11 years as being a single parent.

Our family has been there for her, but she says, "These are my children. They're my responsibility. I will raise my children." She has worked two jobs in most cases for as long as I can remember since Joe passed away to support these children. She has been involved in sports with each of the children, running from one game to the next game to the next game. She's even been a referee and was referee of the year, official of the year in the Soccer Association of Desoto County one year and maybe more than one year.

But constantly involved in the children's lives. It didn't matter what the children had to do, she was going to make a way to be there at least for one of them. And she might have to depend on somebody else to take another one to another game, especially if they were across town somewhere.

But she's been as totally involved in those children's lives as she could possibly be, has done an excellent job of being mama and daddy both.

Q. Have you had occasions to observe any of the children, the Nunnally children, having -- having difficulties coping with the loss of a father's, things that just required a father that they've had to make do?

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MR. ULMER: Your Honor, we object on the basis of hearsay, Your Honor?
JUDGE CARLSON: I'll overrule that objection.
Q. (By Mr. Merkel) Of course, I'm asking what you've observed, Mr. Gideon.
A. My observation is that you can see they miss -- they have told me, you know, "We miss dad." There has been some disciplinary problems, I'm sure, that could have been straightened out if dad had been there. The children, at times, have expressed anger because dad wasn't there with them.
MR. ULMER: Your Honor, this is exactly what I'm talking about. This is hearsay.
JUDGE CARLSON: Well, I'll sustain that particular objection.
Q. (By Mr. Merkel) As far as the

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recreational things that formerly had existed, Mr. Gideon, the water skiing, the boating and all of that, has there been any change in the degree of that with the Nunnally children?
A. Quite a change. Their mama working two jobs, for one thing, made a big difference in the time that she could allow to -- to do such pleasurable things as -- because she worked a lot on Sundays. Weekends were times when most of us were off. Kay didn't get off days. She continually worked. So yes, there has been a change in the way we were able to conduct that over the years.
MR. MERKEL: Indulge me just a moment, please, Your Honor. Tender the witness, Your Honor.
JUDGE CARLSON: Cross examine.
MR. ULMER: Thank you, Your Honor.
CROSS EXAMINATION BY MR. ULMER:
Q. Mr. Gideon, I don't believe we've ever met before. I'm Mike Ulmer, and you're -- I believe your wife testified last Friday in this case, did she not?
A. I believe that's correct.
Q. Now, you knew Joe through his brother, Guyton, I believe.
A. I knew Joe through his family.

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Q. You and Guyton, Joe's older brother, y'all were in the same grade through school?
A. Correct.
Q. And at some point, y'all were together during school at Horn Lake, and then I think you lost contact with Joe until about 1979 or 1980, I believe you told the jury.
A. Correct.
Q. And at that point in time, you -- you were introduced to your wife by Joe Nunnally?
A. In 1981, Joe introduced me to my wife.
Q. Okay. And y'all ultimately, you did marry sisters?
A. Correct.
Q. And I think you testified in your deposition that they are very much alike.
A. Well, they're sisters. They're alike as far as family goes, but no, not personality wise.
Q. I think you indicated they were so much

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so alike that if you died prematurely that your wife would sue the tobacco companies?
A. That's probably correct. They're alike in that aspect. Personalities, they're different.
Q. Now, as far as Joe Nunnally smoking, both of his parents smoked, I believe, did they not?

A. As well as I can remember, yes, they did.
Q. And his brother Guyton smoked?
A. Correct.
Q. And his brother Ben smoked?
A. Correct.
Q. Everybody in the household smoked, did they not?
A. Correct.
Q. Now, the first time that -- Joe Nunnally was not smoking in 1959, I don't believe --
A. Not to my knowledge.
Q. Not to your -- in 1959, he was not smoking. The first time you knew that he was a smoker was when he was on the order of 15 to 16 years of age?
A. That is probably correct, if -- if I even knew at that time for sure he did. A lot of kids smoked around and did it then.
Q. You never saw Joe Nunnally in what you call the smoking room at Horn Lake High School, did you?
A. He was not old enough when I graduated from high school.
Q. And Joe -- just thinking back on these young years when you're -- when you're 15 or 16

years of age, I have a 15-year-old son that's in the 9th grade, and you can't -- if you're in the 9th grade, you can't smoke at school, can you?
A. I don't think you can smoke at school now at any age.
Q. Even back then in the 9th grade, you didn't smoke at school.
A. I think you had to be a junior or a senior, as well as I can remember. At that time, in order to bring a statement from your parents saying you could smoke.
Q. And you probably, when you're 15, you don't smoke at home, I wouldn't think, in front of your parents?
A. I wouldn't think so. I wouldn't have.
Q. I wouldn't -- I wouldn't, either. Now, you talked to Mrs. Nunnally's attorney about your own smoking. And I think you've indicated that you started smoking when you were about 20 years of age.
A. Correct.
Q. And that you continued to smoke on a regular basis until 1993, I believe.
A. That's correct.
Q. And you had some surgery, and your doctor advised you to quit?

A. That is correct.
Q. And the doctors had been advising you to quit every time you went to a doctor all the years before, had they not?

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A. Correct.
Q. I think you said in your deposition, you can't go to a doctor and they don't tell you to quit?
A. That's right, even if they smoke themselves.
Q. All right. And the -- after your surgery, you cut your smoking down to approximately four or five cigarettes a day?
A. It went back to four or five cigarettes a day after --
Q. I'm sorry, I misunderstood you.
A. It returned to about four or five cigarettes a day after about a six-week period.
Q. Help me, then, after your surgery in 1993, just tell the jury your approximate level of smoking.
A. Previous to that or after that?
Q. No, after 1993, after your surgery in '93?
A. Well, the first six weeks after my

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surgery, I didn't smoke. I had no access to get out of the house, and my wife wasn't about to bring them in to me.
Q. I understand. So after that point in time, was it approximately four or five a day that you smoked?
A. Correct. Anywhere from two -- I'd say anywhere from two to five a day.
Q. Now, your -- I believe that your father was a smoker, was he not, Mr. Gideon?
A. That's correct.
Q. And he smoked for 40 years?
A. Approximately. He quit when he was age 61.
Q. And he just laid them down and quit?
A. Yes, he did.
Q. And how old is your father now?
A. He's deceased.
Q. How old was he when he died?
A. 78.
Q. Now --
MR. ULMER: Will the Court indulge me just one moment? Just one more moment, please, Mr. Gideon.
Q. (By Mr. Ulmer) Just one final thing. I

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think you indicated to Mrs. Nunnally's attorney that you didn't know of any effort at any point in time by Joe Nunnally to quit smoking?
A. I think I indicated that to your attorneys in deposition.
Q. I'm talking about earlier today in the presence of the jury, I believe.
A. Yes.
Q. You know of no quit attempts?
A. No, I know of no time he tried to quit.
MR. ULMER: I have nothing further, Your Honor. Thank you.
JUDGE CARLSON: Any redirect?
MR. MERKEL: None. None, Your Honor, and ask that Mr. Gideon might be excused.

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JUDGE CARLSON: All right. Mr. Gideon, you are finally released, sir. Thank you.
MR. MERKEL: The next thing we would offer to be a portion of the deposition of Claude Teague. And we'll go as far as we can, and then there's another point I think we need to take up with the Court.
JUDGE CARLSON: All right, sir. All right. Again, ladies and gentlemen, you know the procedure regarding the next witness of the

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deposition taken, notice given to the witness at an agreed upon time, date and place and taking of the deposition, lawyers present, witness was put under oath and testified under oath in response to questions, and I'll let the lawyers identify Mr. Teague for you.
MR. MERKEL: Your Honor, the deposition was taken on July 8th of 1997. And it was taken in another matter, the state of Minnesota. And the lawyers involved are, of course, no one that's present here. And I'll read the questions that were asked, I think a Mr. O'Fallon was the person who asked the questions that I'll be reading, and of course, Claude Teague is on the witness stand.
(Reading of the deposition of Claude Teague.)
MR. ALDEN: I don't think we're at the same please, Charlie.
MR. MERKEL: I'm on page 6, line 8. Testimony of Claude Teague.
(Reading of the deposition of Claude Teague.)
MR. ULMER: I can't hear the witness.
(Continuation of the reading of the deposition of Claude Teague.)

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JUDGE CARLSON: Let's stop here. That might be a good place to stop and let the jury take a short recess. Ladies and gentlemen, you've been in place about an hour and 15 minutes. Let's take a short break before we go forward.
(A short break was taken.)
(Jury enters courtroom.)
JUDGE CARLSON: All right. Mr. Merkel.
MR. MERKEL: I believe we can pick up again at the top of page 76.
Continuation of the reading of the deposition of Claude Teague.).
MR. ALDEN: Charlie, I think that is marked out.
JUDGE CARLSON: I have it marked.
MR. MERKEL: Leaving -- I think that next question and answer should be there.
(Continuation of the reading of the deposition of Claude Teague.)
MR. ALDEN: Wait. This is objected to. Hold on. This is where we stop.
JUDGE CARLSON: I thought the next objection was line 22.
MR. MERKEL: Starts on line 22, Your Honor.

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JUDGE CARLSON: I have the next objection is line 22.

(Continuation of the reading of the deposition of Claude Teague.)

MR. MERKEL: That's where, Your Honor, we stopped with this morning's.

JUDGE CARLSON: Based on that ruling, if the lawyers had had a chance to go down --

MR. MERKEL: Not without the Court's help, Your Honor.

JUDGE CARLSON: Ladies and gentlemen, just a moment I'll give you a little early lunch break. Let me see the lawyers here at the bench a moment. I anticipate at least one more time, I've got to lock at portion of this deposition again. I think we're about at that point. It probably works out pretty good with an extended lunch break.

(Off-the-record discussion at bench.)

JUDGE CARLSON: All right, ladies and gentlemen, I've tried to get some ideas from the lawyers and estimate time. And I think we can stay here for about 30 or 45 minutes and take care of what needs to be done before we take a lunch break. So I'll give you a break until 1:30, and then we'll start back after that and hopefully move along. So

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we'll see you back here at 1:30.

(Jury exits courtroom.)

JUDGE CARLSON: All right. When we were taking up these portions of the deposition outside the presence of the jury before we got started this morning. Then I think we've gotten to the issue about the document being referred to at page 157, line 22, paper being entitled "Implications and activities arising from correlation of smoke's pH with nicotine impact, other smoke qualities of cigarette sales." And then there was an objection to that document, which it was sustained. And so we need to move forward from that point. And I thought that would cover certain portions of the deposition as far as what may or may not come out, see where we are then.

MR. MERKEL: Your Honor, from -- from that -- where the document is first referenced at the bottom of page 157, the next close to 100 pages of the deposition deal in, to one extent or another, with the properties of nicotine on user satisfaction and whether pH plays a role in nicotine being more satisfying than not. Now, from the standpoint of the objection that was made, it was that this document went towards some claim of spiking of

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nicotine into the Salem product particularly.

And if I understand the Court, that's what the Court has ruled, that -- that that's not an issue, and for that reason, we're not going into it. Now, in the next hundred pages, there is a lot of -- there are a lot of questions and answers that don't deal with spiking at all. They the deal with an attempt to analyze why -- yeah, Marlboro and Kools were capturing more share of the beginner smoking market, and they contributed it to pH.

They compared the pH in Marlboros and

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Kools to Winstons and Salems. And all of this discussion indicates that it was Reynolds' belief, both in their marketing department and in Teague's department that the popularity of these cigarettes was because of the pH differences. That it made the nicotine more easily absorbable, made it taste better. It took away the harshness, and there are various things that are discussed.

And that is the problem, the fact that they deal with pH in some way doesn't have anything to do with spiking of cigarettes. So if the Court's ruling is based on spiking, I think we need to go through and look at what's in these next hundred pages, and it's not that many pages that are

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designated. It just spread over a long, long period of the deposition. Probably about 30 pages that we're actually looking at. But I don't think any of the other references after we get past this initial really go to spiking.

And if -- I guess I just need guidance on what's the Court's thinking and what counsel opposite is really objecting to. Because certainly a comparison of why a competitor's brands are more popular with the beginning smoker than ours are, it mentions pH and talks about free nicotine, there's no comments in there anywhere that they're fixing to spike the cigarettes for that purpose. So --

MR. ALDEN: Your Honor, I'm frustrated. I was talking about pH and ammonia. This document is talking about pH and ammonia. It's talking about the pH and ammonia of Marlboro. It is talking about the pH and ammonia of Kool. That's exactly what I was arguing. That's what all this testimony -- including another document -- I don't have the number in front of me, 594 -- are talking about. That the whole issue of Kool and Marlboro in the market was that their pH had been altered. And that's exactly what we went through in the argument, and I think that's exactly what the Court ruled.

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We didn't do anything to the pH to the increase it of Salem. In fact, it declined. We didn't put any ammonia into Salem. In fact, there's nothing in -- although it's in other products, it's not in Salem. The discussions of Marlboro, the discussions of Kool were talking about how they ammoniating their tobacco. And the scientists were speculating that because their competitors were a known ammoniating their tobacco and increasing their pH, they were increasing sales.

This is exactly what you just ruled on and now we're trying to go back and cut it down to the first two pages of the document. I think the Court's ruling was or should have been -- obviously, you will tell me what it was -- was that pH, ammonia, nicotine manipulation is not in this case, because Salem cigarettes didn't have ammonia. Salem cigarettes declined their pH. There's just no basis to go into nicotine pH, nicotine pH, ammonia or spiking issues, and that's what all this is.

JUDGE CARLSON: I'm satisfied that at this point it appears to me that none of this would

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be relevant. I'm not sure that maybe at some point the Plaintiff may be at a point, understandably maybe anticipating, I think reference has been made

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to some of this evidence has been made in anticipation of what the Defendants may present in the Defendant's case-in-chief. But at this point based on the status of the record, again, I don't see any relevance to any of the subject matter at this point.

MR. ALDEN: Your Honor, I think the pH nicotine manipulation discussion, ammonia, ends at 275. Between then we're talking about one of two or three documents that talk about ammonia or nicotine. Actually, the next -- the other document that we really have to deal with, I think, comes up on 282. It's the -- and we've already talked about it during Dr. Burns' deposition -- I mean during his testimony, I'm sorry. It's the one that -- the planning.

JUDGE CARLSON: Research planning memorandum on thoughts of new branch of cigarettes for the youth market?

MR. ALDEN: Right. And I can say what I've said before, and I'm sure Mr. Merkel can say what he's said before, but bottom line, this one is a draft. He wrote it to himself, nothing happened. They can't show that anything happened, and it deals with a hot button issue. It's excludable under 403,

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we think.

MR. MERKEL: Your Honor, I don't know where the what the term "hot button issue" is supposed to mean. But what it deals with is the very psychological mechanism by which the tobacco company understood they attracted new smokers. What the needs were that the new smokers had or the insecure people who they were trying to induce to smoke their products. It shows how they did not like it at first, how it was an unnatural thing, an unpleasant experience. It discusses the fact that they needed to make the smoke taste better, be less harsh during the learning period.

So that the -- what we've heard read, referred to a minute ago as irrational psychological motivations to learn to smoke, while that was all there was, they would make it easier by making the product less harsh and so forth. So they would smoke until the nicotine took the over. It discusses the phenomena of why people smoke, young people. We don't care what age they are whether we're talking 18 young or eight young, it's people who are beginning to smoke, what they are looking for psychologically and why they turn to it. We're talking about why they continue to smoke after the

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addiction to nicotine has taken over.

And if these factors are known by the tobacco company, they're counted on and planned on in a planning memo by the tobacco company as the basis to get people to begin and continue smoking, the jury should have that information, Your Honor, to compare when they turnaround and claim everybody

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knew it was harmful, only an idiot would have smoked. If anybody was taking reasonable care for his own well-being, he wouldn't have smoked. And if he begin smoking, he would quit because of all these things out there.

And this memo shows exactly why R. J. Reynolds knew that that wouldn't happen. They planned on that not happening. They planned on new people beginning to smoke out of a psychological need for something that make them appear cool, in, macho, in control, masculine, adult, all of these things are discussed in that memo. And that's why people take it up. That's why Joe Nunnally took it up. It's why everybody takes it up. And for them to come in on one hand and say, "We know why they do it. We can count on it. We're going to build our whole industry on this knowledge," and then in the other breath turnaround and say, "That's such

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stupid, ridiculous behavior, that's negligence, and it's assumption of the risk."

And that's -- that's where they are. They know people are going to assume this the risk. Their whole industry counts on it, and the jury should know that too in analyzing the actions of both parties, Your Honor, from a negligent standpoint. Is it negligent to try to get people to begin smoking by irrational psychological inducements, when you know once they do it they're going to become physiologically hooked on nicotine and have a very difficult time, if not impossible time putting it down. And that's why the memo is relevant, both to foreseeability, to negligence, and to comparative negligence. And to their behavior in marketing.

JUDGE CARLSON: Hasn't Dr. Burns already testified to a lot of this on --

MR. MERKEL: Yes, sir, he's testified to all of it other than the document, itself, Your Honor. And the only reason he wasn't allowed to go into the document, we said that since it was a Teague document, Mr. Teague could do it today, and it is a Teague document. So Dr. Burns didn't relate to the document. He -- Dr. Burns testified to his

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opinions that these are why people smoke, and why they continue to smoke.

What this shows is that not only Dr. Burns, our expert, has those opinions, but R. J. Reynolds' main research scientist, also holds those same opinions.

MR. ALDEN: I have a couple of responses to what Mr. Merkel said. First of all, I don't think your ruling the other day was with Dr. Burns that this would come in with Dr. Teague. I think you didn't let Dr. Burns use it, and that was the extent of your ruling.

Second of all, I think the Court makes a good point that the essential point that Plaintiffs claim that they're offering this for, the beginnings of smoking behavior, has already been gone into with Dr. Burns. The essential point of Mr. Teague's views on those have already been gone into. If you

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look at what we just talked about, and what I just read from the witness stand and the crucial role of nicotine, they talk about presmokers. To the extent that's what they need, that's already in there. That's already in there from Dr. Teague's mouth if that's what they need. I would submit that's not what they're offering this for. They're offering it

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for the sex appeal of putting in a youth smoking document.

And I would submit that when you look at this document from the context of this case, how can a planning memorandum from 1972, when Mr. Nunnally was 20, when Mr. Nunnally supposedly had been smoking for 12 years, how can a planning memo that doesn't include research, that merely takes assumptions and spins out, as Dr. Teague just testified, as you just heard. How can a planning memo of spinning out assumptions in 1972 the Plaintiffs cannot connect to Joe Nunnally in any way. The Plaintiffs cannot connect to anything that that Reynolds ever did. They cannot connect this to a new cigarette product that was youth-oriented, Reynolds introduced in 1970s.

And frankly, if you look into Reynolds' corporate history, it continued to go into the tank in the '70s. It was the premier cigarette until 1983. It had been declining for about 10 years. And Marlboro became the number one in 1983. And since then, Philip Morris has far surpassed Reynolds in terms of sales. It didn't introduce this new product that Mr. Teague hypothesized. It didn't develop it, it didn't happen. We.

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Submit that when you weigh any minimal probative value, particularly giving any other testimony they have from Dr. Teague and any testimony they have from Dr. Burns there certainly is no reason to put in this memo into this record.

MR. MERKEL: Your Honor, if I could direct the Court's attention to pages 301, 306, 7 and 8, I think you'll see why it goes directly to what Dr. Burns is testifying as to the motivating or causative factors in a person beginning to smoke. On page 301 at line 3, "For the -- this is quoting from the memo, "For the presmoker and learner, the physical effects of smoking are largely unknown, unneeded or actually quite unpleasant or awkward. The expected or derived psychological effects are largely responsible for influence in the presmoker to try smoking and provide sufficient motivation during the 'learning period' to keep the learner going despite the physical unpleasant ness or awkward ness of the period. The primary effect, of course, is nicotine."

Then over on page 306, "These are the expected or derived gratifications which influence a presmoker to Friday smoking in which a sustained or beginning smoker during the largely physically,

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unpleasant awkward 'learning to smoke phase'. Presmokers learn to smoke and participate with and share identified experiences if the majority of

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one's associates smoke cigarettes, there's a strong psychological pressure particularly with young person to follow the crowd, avoid being out of phase," so on.

"What they emphasize, a new brand name at a young smoker that somehow become the 'in brand" its promotion should emphasize togetherness, belonging, group acceptance. Teens early periods of intense psychological stress, restlessness and boredom." Simply goes on to analyze throughout what the reasons that young people smoker are. And finally, it winds up saying, "Any brand named at the young group should not in any which be promoted as a 'health brand' and should carry some implied risk in the sense that the warning label on the package may be a plus."

In other words, they're even anticipating there that a young person is going to ignore that completely. And actually may be an incentive to him to begin to smoke to appear brave, or macho or whatever. And for them to hide that and then come back and argue to this jury that Joe Nunnally was

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negligent and assumed a risk, when the risk he assumed is exactly what they intended and desired him to assume. I mean, that's the whole -- whole point. And that's why these cases, Your Honor, are different from any other product case, any other warning on any other product goes to a safe use of the product.

In a cigarette case, there is no safe use of the product. If you use it exactly as they want you to use it, put it in your mouth, light it, smoke it as often and as long, and as hard as you possibly can smoke it, you're doing what they expect you to do. And this memo shows that's what they expect to be done. They expect new smokers to continue doing it, and they expect them to be unable to quit once they start. That's why it's relevant.

MR. ALDEN: Your Honor, just a couple of things. First of all, as I understand what Mr. Merkel did, he just read a large part of the document. I don't understand how that responds it's a planning memo. It was written in 1972 when Mr. Nunnally was 20. Nothing ever came of it. He still isn't offering to show you that anything planned in here happened.

To the extent that he's offering it to

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show some understanding of smoking behavior, he's already got that on page 4, the crucial role of nicotine, 565 that was introduced. He -- Dr. Teague goes and says before proceeding too far in that direction, and he goes through a very similar discussion of the one Mr. Merkel just read. I would submit that's all he need. He's got it through Dr. Burns. He's got it through 565. He certainly shouldn't be able to get it through this document which is done for no other reason improper under, Rule 403, in cite the jury for an improper reason. Certainly has nothing to do with this case. Joe Nunnally was smoking for 12 years when this memo was written. Nothing ever came of it.

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JUDGE CARLSON: Again, as I see the status of the record, I would sustain the objection. And I understand what the Plaintiffs are trying to get at. I know it's in anticipation of the Defendant saying that Joe Nunnally assumed the risk, trying to show -- but in any event, I think clearly from the status of the record, the objection will be sustained.

MR. ALDEN: Your Honor, I think that would take care of the rest of the deposition except his internal resume if they still want to read that,

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and then our counter designations. Am I missing something?

MR. MERKEL: I have no idea. Where is the resume?

MR. ALDEN: The resume is discussed at page 285 and again at page 287 through 290. And then they go back into some thoughts, number 569. So if they want to read that, I think that's all that's not excluded by the Court's last two rulings.

MR. MERKEL: All that goes to, Your Honor, the internal -- the resume goes to --

MR. ALDEN: I'm not objecting to it.

MR. MERKEL: To why his long range planning memo was a document of R. J. Reynolds and so forth. And as I understand, that's not the reason for the Court's sustaining their objections. So there's no reason to read his -- his resume about why he's qualified, and why he ranks long range planning things at this point. We may come back to it later on.

JUDGE CARLSON: Is there anything else mentioned as far as Dr. Teague's deposition that would be read to the jury after lunch?

MR. ALDEN: We had have counter designations. I'll cut them down over lunch and

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give them to the Plaintiffs and see if they object to anything that we counter designate, and we can resolve that as we did with Dr. Rodgman.

JUDGE CARLSON: Anything else at this point?

MR. MERKEL: No, Your Honor.

MR. BELL: Your Honor, there are three things that I don't think would take very long if I'd like to take up with the Court if I could.

JUDGE CARLSON: What is that, Mr. Bell?

MR. BELL: First, Your Honor, the first two are just housekeeping matters. Last week we had that big group of questionnaires that the jurors filled out, and they're not in the file. And we would like to make them a part of the record. I think the clerk has already collected them and has them in a box. We want to make sure they're kept with the file -- record of this case. I don't know what the best way to do that would be.

JUDGE CARLSON: I thought they had been marked. I think the clerk inquired of it early on whether or not marked for the record, pretty bulky, whether or not they needed to be brought down to the courtroom each day. And I stated to her no, they do not need to be brought in everyday since it's not a

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trial exhibit or jury exhibit, certainly make sure if the case should go up on appeal, it would be a part of the record, appeal purposes.
MR. BELL: So that's been done?
JUDGE CARLSON: Isn't that right Ms. Brooks?
COURT REPORTER: Yes, Your Honor.
MR. BELL: Okay. That takes care of that one, Your Honor. The second loose end is the pretrial order has not been signed and entered yet. And we -- we had the argument on some of the provisions last week. We took out the language that the Court ruled on, and we tendered a pretrial order to the other side. And I don't know that there's any objection, but we would like to go on and get the order entered. I think that's the last loose end on trial matters that needs to be taken care of.
JUDGE CARLSON: All right, sir anything else at this point before we break for lunch?
MR. BELL: Nothing, nothing more, Your Honor.
JUDGE CARLSON: Anything else, Mr. Merkel, from a Plaintiffs' standpoint? Right at 12:00 o'clock. So we'll be in recess until 1:30, Your Honor.
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(A lunch break was taken.)
(Jury enters courtroom.)
JUDGE CARLSON: All right. Ladies and gentlemen, we're ready to go forward. Since you've had the lunch break, I need to inquire if you'd had occasion to talk to anyone, any effort anyone made to you to talk about the case, any outside information gained about the case, anything you need to bring to my attention?
Again, I take it there's been no outside contact, or discussion or information received. We'll go forward at this time. And just like with Dr. Rodgman last week, at the deposition, each side has the opportunity to offer portions of the deposition which they choose to offer. And so now the Defendant will offer certain portions of Dr. Teague's deposition. All right. Mr. Ulmer.
MR. ULMER: Your Honor, I think it's a total of three pages.
JUDGE CARLSON: All right.
MR. ULMER: Start on 456 at line 10, I believe. Is that correct?
MR. ALDEN: It is.
(Deposition of Claude Teague read into the record.)
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JUDGE CARLSON: Mr. Merkel.
MR. MERKEL: Your Honor, we call Marcille Nunnally.
MARCILLE NUNNALLY,
having been first duly sworn, was examined and testified as follows:
DIRECT EXAMINATION BY MR. MERKEL:
Q. Marcille, if you would, try to pull that mic around where you'll be speaking into it.
A. Okay.

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Q. Would you identify yourself for the Court and jury, please?
A. My name is Marcille Nunnally.
Q. And how old are you, Marcille?
A. 17.
Q. And you were born when?
A. August 11th of '82.
Q. And you are Joe and Kay Nunnally's oldest daughter; is that correct?
A. Yes, I am.
Q. I'd like to take you back, if I could, a little bit, Marcille. First, where are you in school at this point?
A. I'll be a freshman in college at Hinds Community College.

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Q. So you have completed high school at what high school?
A. [DELETED] High.
Q. And what are you going to be studying in college?
A. I'm not sure what I'm going to study, but I want to be a soccer coach for a college.
Q. Taking you back to the time of your father's death, Marcille, how old were you at that point?
A. Seven.
Q. And on back even further than that to your time of your earliest memories of childhood and your dad, tell us a little bit about your relationship with your father.
A. Oh, we were real close, you know. I was his little girl, so we were real close.
Q. You were the first girl in the family?
A. Uh-huh.
Q. Did that make you and he have any kind of a different relationship from your brothers and what they had with him?
A. Yeah, because I always got to do what I wanted to do. Like if we got in trouble or something, I wouldn't get in trouble. My brothers

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would get in trouble, but I wouldn't get in trouble very bad. I was spoiled.
Q. You were sort of a special case for him?
A. Uh-huh.
Q. Tell us about the things that the you and he did, just between the two of you, special things for you.
A. We would go play like board games and stuff like that. And I remember him coming to my brother's soccer games, and I'd go sit with him at the games.
Q. What kind of board games and all did he play with you, Marcille?
A. Like Chinese checkers and -- Chinese checkers is one of the ones I remember real good.
Q. Who won?
A. I don't think I did. I can't remember. I just remember we played Chinese checkers a lot.
Q. What kind of things did you and the family do for recreation and outings, as you recall, when you were small?

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A. We'd go water skiing a whole lot. And like we'd go to soccer games a lot, too, and play soccer and go water skiing.
Q. Who taught you to water ski?

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A. My mom did. She would sit in the water, and my dad would drive the boat. And they taught us that way.
Q. Do you recall what age you were when you learned to the water ski?
A. Probably real little, probably like five, somewhere around there.
Q. Do you remember, Marcille, when you first learned that your father was sick?
A. I do not -- I don't remember, me, them telling us or anything.
Q. Did you appreciate, ever, the seriousness of his problem at any time before he passed away?
A. What do you mean by that? I don't understand.
Q. Well, I mean, at age 6 or whatever when you first -- when he first learned that he had lung cancer, did you understand at that time that he was sick with a very serious disease, or were you too young to appreciate that?
A. I knew that he wasn't going to be -- I knew he wasn't always going to be there for us, you know, that he'd be gone a lot quicker than any of us.
Q. How did you learn that? Who told you

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that?
A. Just by them explaining it to us. Like, you know, what the disease was about and stuff like that.
Q. Do you remember the point in time, Marcille, when he did the pass away?
A. Uh-huh.
Q. Tell us what you recall about that, please.
A. We were on the beach. And we came home -- my mom came home real late at night. And we were all sitting in the living room playing like Nintendo and stuff like that. And she came in, and we just asked, you know, "Where's dad at?" And she told us.
Q. Did you understand the -- well, the finality of that at the time? Were you old enough to appreciate where that left you, and your brothers, and sister and your mother?
A. Not really -- I -- not really, I don't think. I just -- I just knew what had happened. I just -- I don't think I kind of -- I don't think I understood completely, you know, that we wouldn't see him again.
Q. After your dad's death, how did things

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change as far as activities around the house, and recreational things and enjoyable things for the family?
A. Well, for the first, you know, few years and stuff, it was real hard. But mom did as much as she could, and you know, she still took us to all of

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our games and stuff like that.
Q. How was your mom's -- most of her weeks spent? What would she do during most of the time during any given week?
A. She'd be down at the barn a lot. And you know, working with our horses, and picking us up for games, and you know, picking us up from school, and going to games and doing things like that.
Q. What did you understand about the jobs that your mother was doing, taking and working at after your dad's death?
A. Well, she didn't work for a while after. And I think she started working like maybe when I was in like 6th grade, I think, and I just knew that she went to work.
Q. How many different jobs did she hold down at the time?
A. She worked at Bally's, and I think Supply when she was still running our barn, and she still

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works at both of those. I don't think she's had any other jobs, I don't think.
Q. Did you, as children, have to assume chores and duties the to help her out?
A. Yeah, we all had a little list we had to go by every week, and do our chores and stuff.
Q. What types of things did you have to do as you grew up?
A. Like washing dishes and cleaning the clothes, that kind of stuff, like taking out the garbage and stuff, feeding the dogs.
Q. How has most of your mother's time been spent since your dad's death, in what kinds of activities? And by that I'm talking about working, or social life or just the way you've observed your mother's activities since then, Marcille.
A. Us kids has -- that's what her activities are is us, and the -- you know, the friends that she does have there like -- will be like some of my friend's mom's, and they'll go out to the movies. But during soccer season and stuff, she'll see other parents and spend time with them, but mostly just us kids.
Q. Has she had much time for herself as far as adult social activities?

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A. Not -- not really, huh-huh.
Q. How would you characterize her for the first several years after your father died?
A. Let me think. Just -- I don't know, just -- she concentrated a whole lot on us.
Q. Do you feel like your mother has made it possible for you, and your brothers and sister to keep up with your friends, and all and do the things that most of them have been able to do?
A. I don't think -- like all -- every one of my brothers and sister, we all play competitive soccer or have at one time. We all got to go to summer camp, and a lot of kids don't even get to go to summer camp. Because my mom made that -- she let us go to summer camp. She was able to, you know, save money and let us go, and to play competitive sports. A lot of kids can't do that, and all four

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of us got to play. And so she's done a lot more than what most people do for their children.
Q. And are you going to play any sports in college?
A. Uh-huh, I'm on a soccer scholarship to play for Hinds.
Q. And when will that start?
A. I think August.

MR. MERKEL: Thank you, Marcille. Tender the witness, Your Honor.
MR. ULMER: Hello, Marcille.
CROSS EXAMINATION BY MR. ULMER:
Q. My daughter, Mary Catherine, said to tell you hello. Let me ask you just a very few questions if I could. You indicated that you had played competitive soccer for a number of years. I think you lettered in the 9th, 10th, 11th and 12th grade at [DELETED] High School?
A. Uh-huh.
Q. And played for the Memphis Football Club?
A. Uh-huh.
Q. You have to speak out, if you the don't mind, for the court reporter.
A. Yes.
Q. She's taking down what you say and what I say. You indicated, I think, that you enjoy sports, you enjoy tennis?
A. Uh-huh.
Q. Is that right? And you enjoy things like working out in the gym?
A. Yes.
Q. Hanging out with your friends?
A. Yes.

Q. And are you looking forward to moving to Jackson and -- and going to Hinds Community College on a soccer scholarship?
A. Kind of.
Q. Are you scared?
A. Yes.
Q. That would only be natural. Now, you -- you were born on August the 11th of 1982, I think we've established that. And I think that we've talked about -- you know, one of the things that your mom does enjoy is horses. I know she does that as a job, partly, but she's growing up liked horses?
A. Uh-huh.
Q. Do y'all have horses now?
A. Yes, we do.
Q. How many horses do y'all have?
A. I have no idea. I think more than five. I'm not sure, though.
Q. And are they quarter horses?
A. Uh-huh, they're Arabian.
Q. Arabian horses, okay. I grew up around quarter horses, and I know almost nothing about them, probably proven by the fact I couldn't ride one. Can you ride an Arabian, or are they just show horses?

A. You can ride them. We don't, but you can ride them.

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MR. ULMER: I have nothing further, Your Honor. Thank you, Your Honor. Thank you, Marcille.
JUDGE CARLSON: Any redirect?
MR. MERKEL: I have nothing further.
JUDGE CARLSON: Is Miss Nunnally released? Is she finally released?
MR. MERKEL: Yes, Your Honor. Your Honor, at this time we have some exhibits we would offer into evidence, Plaintiff's Exhibit P-60 which is the 1964 Surgeon General's report.
MR. ALDEN: Your Honor, we object to the extent that they want to offer the whole report. If they want to offer them for particular portions, we don't have an objection to that. But the entire report deals with a host of issues that aren't relevant here.
JUDGE CARLSON: Any response to that?
MR. MERKEL: Well, Your Honor, we offer the entire report. Of course, there's certain parts of it that will be used or read. But I don't know what they object to about it. We would offer the report. That was the way the exhibit was -- was identified and listed.

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JUDGE CARLSON: It will be marked and received into evidence.
(Exhibit 60 marked for identification and entered into evidence.)
MR. MERKEL: We would offer Exhibit P-763 with which is a portion of the 1988 Surgeon General's report dealing with addiction.
JUDGE CARLSON: Objection?
MR. ALDEN: No, Your Honor.
JUDGE CARLSON: That will be marked and received.
(Exhibit P-763 marked for identification and entered into evidence.)
MR. MERKEL: We would offer Plaintiff's Exhibit 565, Your Honor, which is the Teague memorandum, the nature of the tobacco business and the crucial role of nicotine therein that was read from earlier.
MR. ALDEN: Your Honor, I think our objections have already been stated and ruled on.
JUDGE CARLSON: Objection will be noted, be marked and received into evidence.
(Exhibit 565 marked for identification and entered into evidence.)
MR. MERKEL: Your Honor, we offer P-6,

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Am. Jur. (sic) desk book, "Expectation of life and expected death by race, sex and age" which would go toward Joe Nunnally's life expectancy that's already been testified to by the economist.
MR. ALDEN: No objection, Your Honor.
JUDGE CARLSON: Be marked and received into evidence.
(Exhibit P-6 marked for identification and entered into evidence.)
MR. MERKEL: And we would offer, Your Honor, Plaintiff's Exhibit 562 which is the Teague memorandum on implications and activities arising in correlation of smoke and nicotine extract, et

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cetera, which was part of this Court's ruling on the Teague deposition.

MR. ALDEN: This one?

MR. MERKEL: I know, Your Honor.

MR. ALDEN: We object, and I think our objection is overruled.

JUDGE CARLSON: I think that the document the objection was sustained; is that correct?

MR. MERKEL: Yes, Your Honor. We'll tender it for the record.

JUDGE CARLSON: Marked for ID. The ruling on the objection stands.

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(562 marked for identification.)

MR. MERKEL: Exhibit 569, the same way, Your Honor. Which is the another Teague memorandum about new brands of cigarettes. We'll offer that one.

JUDGE CARLSON: Marked for ID purposes, and the ruling on the objection will stand.

(569 marked for identification.)

MR. MERKEL: At this time and with the Court's permission and if you would explain to the jury the impact of it, we have some of the facts from the pretrial order which established by pleadings, or stipulation or admission that we would like to publish.

JUDGE CARLSON: Any comments by defense counsel?

MR. ULMER: We don't object, Your Honor. The only thing we would suggest, as a matter of efficiency, is perhaps read all the stipulations at this time. But if that's not appropriate, then we would reserve those until our case.

JUDGE CARLSON: All right, sir. Let it be noted, of course, still being the Plaintiffs' case-in-chief, the Plaintiff would have opportunity to offer portions of the stipulation. I might

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mention, ladies and gentlemen, basically what this is, and you know by now -- you certainly know that the testimony is coming to you by way of the witnesses who testified, additional evidence by way of documentary evidence.

But also through our Rules of Civil Procedure, there can be certain stipulations. That would be where the parties agree as to the existence of certain facts. And there's no need, therefore, to offer evidence or prove of those facts if they're stipulated to. So you may consider these stipulations as evidence and facts that are proven.

MR. MERKEL: Your Honor. Stipulation number 4, "Winston, Camel, Salem and Doral cigarettes have always been manufactured by R. J. Reynolds." Number 5, "Joseph Nunnally incurred medical bills in the amount of $30,623.72, all of which were reasonable in amount and necessarily incurred."

Number 6, "Plaintiff, Kay Nunnally, was born August 25, 1951. According to the life mortality tables, she has, as of June 26, 2000, a life expectancy of 32.1 years." Number 7, "Joseph Kable Nunnally was born July 18, 1979. According to

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the life mortality tables he has as of June 26 a life expectancy of 53.6 years."

Number 8, "Spencer Levi Nunnally was born on April 13, 1981. According to the life mortality tables, he has as of June 26, 2000, a life expectancy of 54.6 years." Number 9, "Marion Lucille Nunnally was born on August 1, 1982. According to the life mortality tables she has as of June 26, 2000, a life expectancy of 61.8 years. And Brenda Kay Nunnally was born on October 29, 1986. According to the life expectancy -- life mortality tables she has as of June 26, 2000, a life expectancy of 64.8 years."

We would also, Your Honor, at this time, like to publish certain answers to interrogatories which were provided by the Defendants with regard to interrogatory number 5 which is "As any chief executive officer for R. J. Reynolds Tobacco Company or RJR Nabisco, Inc., ever stated that cigarettes may cause cancer, and if so, please state the following, the state of where the person is presently living and his name and address and the place and date the statement was made," and from that we would offer excerpts that are during the period of Joseph Nunnally's life.

MR. ULMER: Your Honor, first we object on the basis of relevancy, but second, we received no notice, unless I'm mistaken somewhere else that this was going to be read so we could have a chance to look at it. I've not had a chance to see it. So I object on that basis as well. Have I overlooked something, Charlie, was it given to us, and I didn't get it?

MR. MERKEL: It's your answers to interrogatories.

MR. ULMER: I know what it is, but I know what the rule is, too. Your Honor, we would object for those two reasons.

JUDGE CARLSON: Let me see the exhibit.

MR. MERKEL: The highlighted ones, Your Honor, of the statements from the years during Mr. Nunnally's life.

JUDGE CARLSON: The objection has been noted and will be overruled. I'll permit the ruling. Again, ladies and gentlemen, another way of evidence coming to you, this is by way of what's called interrogatories. Simply questions and all the parties in any litigation have a right to submit interrogatories during the pretrial procedure to parties, and have other parties answer under oath certain questions. And then these matters to be presented to the jury during the course of the trial. That's how it's coming to you here today by way of Mr. Merkel for the Plaintiff reading certain responses to questions previously submitted to -- evidently to R. J. Reynolds.

MR. MERKEL: The interrogatory asked was, "Has any chief executive officer for R. J. Reynolds Tobacco Company or RJR Nabisco, Inc., ever indicated that cigarettes cause cancer, and if so, please

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state the following, A, the substance of the statement. B, whether the person is presently living, and if so, his name and address. And C, the place and date the statement was made."

The supplemental response is subject to and without waiving its objections, Reynolds states "That pursuant to Court order dated February 8 it has undertaken a good faith effort to provide a brief statement as to the substance of the statements by executive officers, CEO's, as to whether cigarettes may cause cancer. The testimony from which this response has been derived is and has been made available to Plaintiffs many months.

However, instead of conducting her own review, Plaintiff has chosen to have Reynolds review the testimony and provide a statement as to its

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substance. Accordingly, any brief statement of the substance of Reynolds' CEO's is necessarily subjective, Reynolds states that if Plaintiff believes the information set forth below is in any way inaccurate, misleading, incomplete or otherwise inadequate, Reynolds request that Plaintiff contact Reynolds' counsel. Finally, by providing these responses Reynolds does not waive its right to object." The first responses given would be those of Edward A. Horrigan, Junior, presently living.

The first of Mr. Horrigan's statements. Mr. Horrigan stated after three decades of investigation and millions of dollars invested, the smoking and health controversy remains unresolved. He said that the net result of all the effort is that no causal length between smoking and disease has been established. He stated that a number of very broad, sweeping statements regarding smoking, disease and addiction are included in the particulars of a bill regarding which he is testifying.

He said that there are questions raised by statistical associations relating to smoking and disease which must be answered. He said that the truth is that all these statements must be presented

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are a established fact in the bill has been challenged by research findings of many eminent scientists. He stated there are obviously new statistical evidence and links between illnesses and cigarette smoking. He does not agree that all the scientific and medical community agree with the interpretation of these findings.

He stated that the science to date after much research, including 100 million dollars funded by the tobacco industry, indicates that no causal link has been shown. This statement was made in Congressional testimony, the Comprehensive Smoking Provisions Act hearings before the House Committee on Energy and Commerce and the Subcommittee on Health and the Environment in the 97th Congress, second session, March 12, 1982.

Mr. Horrigan further testified, Congressional testimony before the Comprehensive Smoking Prevention Education Act of 1981, hearings before the Senate Labor Committee, Human Resources,

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on March the 16th, 1982. Horrigan stated that there are questions raised by statistical associations relating to smoking and disease which must be answered. But all of the statements in the bill presented is an established fact, have been

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challenged by research findings of many eminent scientists.

He stated that after three decades of investigation and millions of dollars invested by the government, the tobacco industry and other private organizations, the smoking and health controversy remains unresolved. He said that the net result of all of the effort has been that no causal link between smoking and health has been established.

Further, on May the 10th, 1982, Mr. Horrigan, in Congressional testimony before the Comprehensive Smoking Prevention Education Act of 1981, hearings before the Senate Committee on Commerce, testified as follows. Horrigan stated that there is a great deal of statistical evidence indicating harm from smoking. But there is a multitude and abundance of scientific data that challenges that which has been used boy the tobacco industry.

Finally, Mr. Horrigan on August 31st, 1984, in a deposition in the case of "Dewey which versus Reynolds Tobacco," Horrigan stated that the basis for his testimony before Congress that a link between smoking and health had not been established

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is that while there has been a vast amount of publicity to study and link cigarettes with diseases, there is also a vast amount of science that raises questions and says it is still an open question. He stated that Reynolds will not take the position that cigarettes do not cause cancer but that the question remains unresolved.

The next CEO provided is Gerald H. Long, also presently living. His first testimony is on June the 25th, 1964 -- excuse me, I'm sorry. I've given the wrong name. The witness is Bowman Gray who is now deceased, and his testimony was given on June the 25th, 1964, before the Congress, Cigarette Labeling and Advertising hearings before the House Committee on Interstate and Foreign Commerce.

Mr. Gray stated that smoking over a long period may be injurious to the health of a relatively small percentage of smokers. He stated that there are just as many millions of smokers who are not injuriously affected by cigarette smoking, and that it may be injurious to some perhaps. He stated that it has not been proven that cigarettes are harmful to health.

Again on March 24, 1965, Congressional testimony before the Cigarette Labeling and

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Advertising Hearings of the Senate committee on Commerce, Gray stated that he is not qualified to participate in a debate on the medical or science questions relating to tobacco and health. However, many distinguished scientists are of the opinion

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that it has not been established that smoking causes lung cancer or any other disease. He stated that nearly everyone familiar with these difficult problems will agree that there are large and basic areas where knowledge is lacking. That there is a very high degree of uncertainty and that a great deal the more research is necessary before definitive answers can be given.

Finally, on April 13, 1965, again before a Congressional committee on cigarette labeling and advertising, House Committee on Interstate and Foreign Commerce, Gray stated he is not qualified to participate in a debate on the medical and scientific questions related to tobacco and health. However, many distinguished scientists are of the opinion that it has been established that smoking causes lung cancer or any other disease. He stated that nearly everyone familiar with these difficult problems will agree that there are large and basic areas where knowledge is lacking. That there's a

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very high degree of uncertainty and that a great deal more research is necessary before definitive answers can be given.

Finally, interrogatory number 8, "Has any chief executive officer for R. J. Reynolds Tobacco Company or RJR Nabisco, Inc. ever stated that smoking cigarettes can be addictive, and if so, please state the following, substance of the statement, where the person is presently living, and if so, his name and address, and C, the place and date the statement was made."

The first response is to Edward A. Horrigan, again, presently living, and in a Congressional testimony in 1982, March the 12th, Horrigan stated that the conclusion that smoking is addictive is contraindicated by the 1964 Surgeon General's report and the conclusions of many experts since '64. He stated that there is absolutely no proof that cigarettes are addictive.

In August 30, 194, Mr. Horrigan stated that, "The company has taken the position that smoking is not an addiction, because people quit. And there are studies which say that cigarettes are not addictive. He stated that he considers addiction to be totally dependency and inability to

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quit."

And the last one is Andrew Schindler, presently living, and in 1998, Mr. Schindler stated in trial testimony, "I don't believe that smokers are addictive. I believe that they have free choice of start smoking, and I believe they have free choice to quit. In 1988, I believe there were changes that basically altered how addiction was defined, and suddenly intoxication and those types of things were not required.

If something is a habit that people enjoy, that may be difficult to give up. You're in a broader class and broader definition of addiction. And under those terms if it's a habit that some people might enjoy, that some people might have difficulty giving up, now if we say if that's the

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definition of addiction, cigarette smoking would certainly meet that. But if the definition of addiction is one of intoxication, risk of losing your job, social dysfunction, needing to be committed to an institution to get off the product, I don't believe cigarettes meet that definition. That's heroin, cocaine, alcoholics, and I don't believe cigarettes meet that definition."

MR. ULMER: Your Honor, I'm not certain

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whether or not the complete document was read because I haven't had a chance to see it. I will review the transcript, and if it was not and I think it ought to be read in fairness, I'll do that in my part of the case.

JUDGE CARLSON: All right. Thank you.

MR. MERKEL: With that, Your Honor, other than the offering of the Teague and Rodgman depositions for identification purposes, the Plaintiff would rest.

JUDGE CARLSON: All right, ladies and gentlemen, that announcement that the Plaintiff has rested her case-in-chief, this is the customary point in the trial to give the jury a recess. I know you haven't been in place all that long, maybe about 40 minutes, but I do need to take up some matters before we go forward. So I'll go ahead and let you take a break at this time.

(Jury exits courtroom.)

MR. LISTON: Your Honor, may I approach the bench with Charlie for a minute?

JUDGE CARLSON: All right.

MR. LISTON: Off the record.

(Off-the-record discussion at bench.)

JUDGE CARLSON: We'll take a short recess

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here.

(A short break was taken.)

(Jury enters courtroom.).

JUDGE CARLSON: Again, ladies and gentlemen, in an effort to always keep the jury informed, you know you heard the announcement here in open Court right before the recess that the Plaintiff had rested her case-in-chief. And now at the appropriate time, the Defendants will go forward or the Defendant will go forward and present its case-in-chief. And it's anticipated by the Defendant through counsel, I learned just during the recess, that a possibility that the Defendant's presentation of the evidence could be concluded at least by the end of the day on Friday of this week, today being Wednesday, of course.

So that's where we are, and then depending, of course, on the -- any additional proof by the Plaintiff, then it's anticipated that the jury could get the case for deliberation on possibly Monday of next week, just depending on how things go between now and then.

I say that to you to let you know that in a moment I'm going to let you go for the day, and so everybody can regroup here at this stage, and I'll

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go over some matters with the jury -- excuse me,

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with the attorneys, and get things ready to go first thing in the morning. I can appreciate the fact with it being, you know, roughly 2:30, the possibility of another two, two-and-a-half hours of working time the left that you would prefer to go forward, and I guess everybody would. But at this point, I'm going to let you go, and again stay here with the lawyers, get some other matters taken care of, use this time to, again, regroup and get everybody ready to go first thing in the morning.

So I do the need to caution you, please, about the instructions you're under, not to discuss the case with each other or anybody else and make no effort to read any news accounts on the case or gain any outside information on the case. So with that in mind, and even though you've had an extended break, maybe you can utilize the time to take care of any unfinished business that you carried -- brought with you here today after the holiday. And we'll get started at 8:30 in the morning, if you'd be in the jury room by that time. Thank you.

(Jury exits courtroom.)

JUDGE CARLSON: I believe that was the last juror. So what says the Defendant now?

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MR. ALDEN: Your Honor, now comes Defendant, R. J. Reynolds Tobacco Company and moves the Court to exclude the evidence, to direct a verdict in favor of Reynolds. The Plaintiff has failed to make out a prime fascia case under any theory it relied upon. We have four different grounds that we filed on motions this morning. If I could, I'd like to take them up in turn and not do them all in one lump. Is that okay with you.

JUDGE CARLSON: Yes, sir.

MR. ALDEN: With all due respect, Your Honor, we never should have gotten this far. This case has two fatal legal errors. I would submit that no case like this has ever been submitted to a jury, and there's a good reason for that. First one is preemption. And when I talk about preemption, I'm talking about the Federal Cigarette Labeling and Advertising Act which was passed in about 1965.

Now, in 1965, Congress just had the Surgeon General's report in '64, and they were considers what should we do about tobacco? And they had a whole range of possibilities in front of them. They could have banned tobacco. They could have done nothing, they could have enacted some kind of automatic compensation scheme. They could have let

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a federal agency regulate tobacco. They didn't do any of those. Instead, what they did was enact a Labeling Act. And the Labeling Act as it says right in its first section "is a comprehensive federal program to deal with cigarette label and advertising to deal with any relationship between smoking and health."

And they did more than that. In the Labeling Act, they said exactly what they were doing. They had two purposes. The first purpose was to warn the public. "The public may be adequately informed about any adverse health effects

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of cigarette smoking."

Their second purpose was to "protect commerce and the national economy to the maximum extent." Now, step back from the Labeling Act and let's look at what Plaintiffs' claim here is. Plaintiffs' claim is not that Reynolds didn't manufacture its cigarettes as it intended. We don't have a manufacturing defect claim. The Plaintiffs' claim isn't that we failed to warn.

Plaintiffs' claim is a design defect claim, whether it's stated under negligence, or it's stated under strict liability. In either event, it's a design defect claim. But their design defect

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claim is very weird, and I would say unique design defect claim, because it doesn't really have a design defect. What it is is a claim that cigarettes are too dangerous to sell. That's their claim.

Dr. Burns testified, "There's no such thing as a safe cigarette?" "Correct." "All cigarettes that are on the market as currently configured are unreasonably dangerous?" "Yes." What they're telling you is that the tort duty that is at issue here is a supposed Mississippi tort duty not to sell cigarettes, not to make them safer in some way, but to not sell them.

Now, having --

JUDGE CARLSON: Let me interrupt, I guess, going back to one of the initial statements that maybe we should not have gotten this far. And I'm asking, sincerely, you know, from the Defendant's standpoint, as to how "Wilkes" and "Horton" got as far as it did to jury verdicts and appeals to the State Supreme Court. What was different about Wilkes and "Horton"?

MR. ALDEN: I think they're very different. First of all in "Wilkes," which I'll talk about in a minute.

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JUDGE CARLSON: I think in one of those cases, I forget which one, that the Judge as a matter of law ruled that cigarettes were unreasonably dangerous and went on to a jury verdict and Supreme Court appeal.

MR. ALDEN: He did, Your Honor. Let me address your question in two ways. First of all, we didn't move on it before, which in a sense is our fault. As to your second question about "Wilkes" and "Horton" and how they got as far as they did. "Wilkes" clearly did exactly what Plaintiffs are asking you to do here. I wasn't going to deal with it in preemption, because we have a separate argument about why "Wilkes" is wrong. But I can deal with it right now. If you look at the "Wilkes" decision, they simply got it wrong. In "Wilkes," he cited no Mississippi case --

JUDGE CARLSON: Judge did or Supreme Court did?

MR. ALDEN: Well, just the judge. If you look at "Wilkes," he cited no Mississippi cases to support his absolute liability finding. Instead, he cited a 1966 case in which the Mississippi Supreme

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Court adopted strict liability. And then he cited four cases from California, and those -- I don't

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have those cases for you, but we cite them in our brief.

Not one of those cases involved absolute liability. They all involved either an exploding bottle -- as I recall, I think they were an exploding bottle, a bulldozer that supposedly allowed someone to back up without being able to see properly. One of them was -- I honestly can't remember the other two. But in each case of the California cases that he cited in "Wilkes," there was an alternative design. Not one of the California cases that he cited as support for his claim that we have absolute said that.

And also in "Wilkes," he ignored the fact that between the cases he cited and the time he wrote his decision the California Supreme Court had said we don't have absolute liability. That's the daily case that we cite to you in our Mississippi State law brief. I don't have the citation here for you. But the California Supreme Court, which was the only jurisdiction the "Wilkes" Court looked to has said that claim doesn't exist in California at least.

So really, the "Wilkes" Court is out there alone. And then if you look at what happened

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at "Wilkes" went forward, in "Wilkes", the Defendant won, notwithstanding the fact that there was an absolute verdict -- absolute liability instruction from the Court. The Defendant won on causation. So "Wilkes" went up to the Supreme Court here on a Plaintiff appeal -- appeal from a defense verdict. And the only issue before the Supreme Court was that defense verdict.

If you'll look at the "Wilkes" Supreme Court decision, they don't begin to address it. They don't say a single thing about the "Wilkes" trial court's by then moot ruling on absolute liability. So, really, it is only the "Wilkes" trial court that has gone that far in this state.

Now, you also mentioned the "Horton" case. In "Horton", if you look at the two dissenting justices, there are two opinions by dissenting justices. Excuse me, I misspoke. And in each of those cases, they say that American had been shown to increase the nicotine, had been shown to have contaminants in its cigarettes. They were not dealing with an absolute liability claim in "Horton." They were dealing with a spiking of nicotine and a contamination of the cigarettes claim.

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And if you look at both -- I think it was Justice McRae's and Justice Lee's, if I'm remembering correctly, opinions, if each case where the "Horton" Court would have remanded to have a new trial by the Plaintiff who also hadn't prevailed. But in each case if you look at the Justices who said let's send this back, they weren't dealing with this kind of claim. They were dealing with a very

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standard design defect claim. You put something in you shouldn't have put in. You designed your cigarette this way. You should have designed it that way.

That is not what we have here. What we have here is cigarettes, no matter how you design them are too the dangerous to sell per Mississippi State tort law. That's the claim here, and in that sense, it's very different than "Horton", and it's similar only to what the trial court found in "Wilkes." And I would submit no other Court other than the "Wilkes" trial court and certainly not the Mississippi Supreme Court in "Wilkes" has affirmed that kind of liability. Does that answer your question?

JUDGE CARLSON: Yes, sir.

MR. ALDEN: Now, here we have on the one

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hand the Labeling Act that says we want to protect commerce and cigarettes to the maximum extent warning the public. You have on the other hand Plaintiffs' claim that says in Mississippi just selling ordinary cigarettes, cigarettes that can't be made any safer, cigarettes that don't need a new warning, cigarettes that were made exactly as attendant, so they don't have a manufacturing defect is a violation of tort law. So you have, I would submit --

JUDGE CARLSON: Siren. All right.

MR. ALDEN: I would submit right on its face that is as direct an implied actual conflict between the statute and Plaintiffs' claim as you could ever want. But you don't have to take my word for it, because the U.S. Supreme Court just this year, it --

JUDGE CARLSON: Second wave.

MR. ALDEN: Okay. That conflict, I would submit, is obvious on its face. But you don't have to take my word for it, because just this year, the U.S. Supreme Court has told us what Congress was doing in the Labeling Act. In "FDA versus Brown & Williamson," 120 Supreme Court, 1291, decided in 2000, the FDA tried to, it's got a lot of publicity,

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assert jurisdiction over cigarettes. And in deciding whether they had jurisdiction, because the cigarette manufacturers had challenged their jurisdiction, because that was a new thing that FDA had never done before, in fact, they prevailed in the 4th Circuit, found they did not have authority to regulate cigarettes. That went up to the Supreme Court.

The Supreme Court in looking at whether the FDA had authority wrote some instructive things about Congress was doing in the Labeling Act, what it meant to do and what it meant to ban. They said in the FDA opinion Congress has foreclosed removal of tobacco products from the market. Congress has directly addressed the problem of tobacco and health on six occasions since 1965, and it goes on and cites them. "Nonetheless, Congress stopped well short of ordering a ban. Instead, it has generally regulated the labeling and advertisement of tobacco

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products.

Expressly providing that it is the policy of Congress that commerce and the national economy may be protected to the maximum extent consistent with consumers being adequately informed. Indeed, the collective premise of these statutes is that

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cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would, therefore, plainly contradict Congressional policy." That couldn't be more clear, that Congress has said cigarettes are a legal product. They said it in the Labeling Act, they said it very directly. And the Supreme Court tells you that's what they said.

So you have on the one hand a clear purpose of the Congress set forth in a statute found by the United States Supreme Court this year. And on the other hand, you have the Plaintiffs telling you that Mississippi doesn't allow you to sell cigarettes without violating its tort law. I would submit that under standard implied conflict preemption principles, that is an instance of implied preemption.

And Supreme Court also has talked about when you have preemption, and they say that, "State laws have been preempted when they 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

I would submit when you have on the one hand the purpose of promoting and protecting the sale of a product. And you have, on the other hand,

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banning the sale of a product or making it a violation of tort law to sell a product, you couldn't have a more direct actual conflict.

Now, Plaintiffs -- we talked about this in May, and Plaintiffs' response then and I suspect that their response today was that, wait a second, we are saying that it's a violation of Mississippi tort law merely to sell cigarettes. But it's just a tort law, and you can go forward and sell your cigarettes. What we're saying is that if you sell them, you have to compensate people. So notwithstanding the fact that you're violating tort law, and that's why we're imposing these damages on you, you can go ahead. You have the option of, on the one hand, obeying tort law, or on the other violating it and paying damages.

That argument has a little bit of facial appeal. But that's an argument that's been considered and rejected three times in the last eight years, twice by the United States Supreme Court and once by this state's Supreme Court. That was exactly the argument that in "Cippolone" the Plaintiff made there. In "Cippolone", the Plaintiff argued that there is no preemption at all under the Labeling Act.

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We're merely saying if you want to put on additional warnings, if you don't put on additional warnings, you will have to pay damages. That's just a tort obligation. That doesn't create a real

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mandate. So it doesn't fall within the prohibitions and the statute. The Supreme Court said no. Here's what they said. The Plaintiff had argued that common law damage actions do not impose "requirements or prohibitions." And Congress intended only to trump state statutes, injunctions or executive pronouncements. Supreme Court said no. "State regulation can be as effectively exerted through the an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be a potent method of governing conduct and controlling policy."

They said no, a tort law is a mandate. Again, the Supreme Court considered that issue just this year in the "Guyer" case, which again, is something cited in our brief. And "Guyer" is now reported, but my copy is not. "Guyer" was an air bag preemption case, where Honda had not put an air bag in a car manufactured in the mid-'80s. And the Plaintiff brought a claim saying that the failure to

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put an air bag in the car was a violation of tort duty. There was a statute, federal statute that said manufacturers had the choice. They could either use seat belts or they could use air bags.

And the manufacturer argued, successfully, as it turned out, that that choice was Congress's mandate. And when the Plaintiff responded to that, what the Plaintiff said was, yeah, you had a choice, but you could have just ignored this tort obligation. And you could have paid damages, exactly the argument that I suspect you're going to get from Mr. Merkel in just a minute. The Supreme Court said no.

This is a tort duty. Tort duties are real legal mandates. And what they said was this Court's preemption cases ordinarily assume compliance with the state law duty in question. So what the Supreme Court is telling you is that when you're considering whether a state tort duty is preempted, you have to assume that it was followed. Here if you assume that the tort duty was followed, it would be that you assume that cigarettes are not sold. Because that's the tort duty that they're saying Reynolds was subject to.

And the third Supreme Court case that

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controls on this issue is another air bag case. This time out of the Mississippi Supreme Court, "Cooper Versus General Motors Corporation," 702 Southern 2nd, 428, Mississippi. It's virtually identical to the "Guyer" case. You had a no air bag claim by the Plaintiff. The Defendant said look, the statute gave us a choice. If you're telling me I had to do one thing according to tort law, that's inconsistent with Congress's policy that I was supposed to have a choice. It's preempted.

The Mississippi Supreme Court agreed. Allowing common law liability under Mississippi law for failure to install an air bag punishes manufacturers for exercising the federal sanctioned choice. It would create an actual and definitive

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conflict with the federal policy. That's exactly what you have here.

Here you have the most direct and apparent conflict you can imagine. You have a supposed state tort duty, do not sell cigarettes. You have Congress on the other hand saying we are going to let cigarettes be a legal product, and we're going to let them be sold provided they have our warnings. That is a direct conflict. That is what you need for actual -- for implied conflict

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preemption, and accordingly, Plaintiffs' claim is preempted by the Labeling Act.

JUDGE CARLSON: Mr. Merkel.

MR. MERKEL: Your Honor, in the first place, the Labeling Act counsel refers to didn't even arise until 1966. We're dealing with a six-year period from 1960 to 1966 when there was no Labeling Act. Nothing could preempt anything, because it was not -- wasn't there. And what they did with their product and what information they put out with the product during those six years is even apart and separate from the Labeling Act, itself.

Now, when we get to what the Labeling Act dealt with, the Labeling Act dealt with labeling. And the scope of the Labeling Act was discussed in "Cippolone versus Liggett." U.S. Supreme Court case, and in "Cippolone", the United States Supreme Court held that the amended Labeling Act preempted claims based on failure to warn and neutralization of federally mandated warnings to the extent that these claims relied on omissions or inclusions in the manufacturer's advertising or promotion.

There was nothing about that fact that said cigarettes are not going to be -- there was nothing that protected cigarettes from state tort

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liability. Granted, Congress didn't outlaw them. It didn't ban them, but neither did it say this is some sacred cow that is exempt from the application of normal tort laws that apply to every other product in the United States.

It simply said we're going to make them put this label on the pack. And to the extent that they put this label on the pack, that's going to preclude any questions about the contents of the label, whether it was adequate, inadequate or anything concerning warnings and labeling of the product from that day prospectively, not retroactively. We've got a period of six years where even the labeling or a failure of the industry to label is still fair game and up there for consideration by the jury.

After 1966, we've got simply the regular tort law in Mississippi that pertains to every other equally legal product. Cigarettes haven't been made some super legal product or something that deserves protection beyond anything else. In fact, as far as I know, every product that any manufacturer wants to sell is legal until some Congress or some Legislature decrees it to be illegal. And then it falls out of that category. So every tort law,

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every case deciding a product liability law that has ever been decided has been dealing with an equally legal product.

And we point out, as Your Honor stated, the Mississippi Supreme Court has already dealt with this in the "Horton" case and in the "Wilkes" cases. What the Plaintiff is saying, in essence, is that cigarettes, as they are currently being made and as they were currently being made during -- we don't care how they are currently being made. As they were made during periods when Mr. Nunnally was smoking them, we say they were a defective and unreasonably dangerous. Because under the "Prestage" case, the risk associated with their use in its intended way, far and away outweigh any contrived utility that the product might have.

And that's exactly what Judge Bogan found in the "Wilkes" case, and the Supreme Court dealt with that, talked about it, and never modified a thing that Judge Bogan had said. In fact, recognized the general effectiveness of cigarettes in "Horton versus American Tobacco," the Court noted one of the medical experts testified that the number one human carcinogen is tobacco smoke which is comprised of over 4700 different substances,

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including nicotine, carbon monoxide, formaldehyde, acetylenehyde and others. And the Court noted there was evidence that cigarettes cause both mental and physical addiction. Clearly evidence of a defect was presented. The Court further notified in the case subjudies, that cigarettes are not reasonably safe for their intended use, i.e. human consumption.

Here Dr. Burns has testified to basically the same things. Dr. Burns has testified with regard to the risk utility test that out of every six two-pack-a-day smokers, one will die of lung cancer unless they quit. 40 percent of all people who smoke will die prematurely of some lung-related disease or tobacco-caused disease, and this are over 400,000 deaths each year. He's testified there is no utility to smoking. And Judge Hawkins, who dissented in the "Horton" case, nevertheless, agreed himself that cigarettes are a defective and unreasonably dangerous product under the risk utility test, and from his opinion were the following excerpts.

What reasonable person could escape concluding that the risk the dangers in smoking far outweigh any utility or any possible benefit. There is no more usefulness in smoking than there is in

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gambling or drinking whiskey. Judge Hawkins again, cigarettes are not tools machines or products used to make a living or furnish life's necessities or comfort. They're not a medicine to cure an illness or relieve symptoms of disease. No doctor would ever prescribe or recommend his patient take up cigarette habit. They're consumed solely for pleasure of consumer. Hawkins realized even the "Horton" decision, itself, was a matter of law, cigarettes were a dangerous and defective product under Mississippi law as it existed at that time.

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So the Court has addressed this very question, and Judge Bogan found the question in favor of the Plaintiff there that is to be presented to the jury here, Your Honor. Now, the "Prestage" factors include one that a manufacturer who knows the propensity of his product to cause harm, who knows what utility it has, who knows how effective warnings might or might not be in preventing harm has been found by society to be the more appropriate person to bear the loss if a foreseeable loss does occur.

And in this instance, we're talking about two ways that they can do the that, and "Prestage" completely addresses that. One of them is that they

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can do it by raising the price of their product, and another is that they can do it by ensuring against the loss.

We've got an industry and a Defendant here who want to tell the world that there are there are millions and millions of happy cigarette smokers who never get any disease. And that may well be so, but for those who get it, Your Honor, just like those who stick their hands in a machine or a machine tool that is designed to serve some very functional purpose are to be compensated because it wasn't properly guarded, if you're one of the ones that comes up with cancer as a result of smoking in the intended fashion this Defendant's product, then this Defendant ought to pay for that.

That is simply a cost of doing business, like research cost, buying the tobacco, putting the things through the machines to make them, whatever else. They can actuarial calculate that. They can insure against it, and they can go right on selling their legal product. But it's classification as a legal product does not in any way prohibit it from being found -- this Defendant from being found guilty under Mississippi tort law for either negligence in the way it markets its product, in the

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way it puts what's out there now.

I don't know what they could do with this product, whether they could make it more safe or not, but it's a forgone conclusion that if what they are arguing with the Court is so, there's no incentive for them to even waste their time or another nickel trying to make it safe. They're running around saying we've got a legal product, and that alone makes sure we can't be found liable under any state's law in the country. That didn't happen in California, and it didn't happen in Florida in the last several months. They're not still through fooling around down in Florida about punitive damages because all of this is preempted, Your Honor. The only thing that is preempted is labeling warnings.

Not whether the product is somehow, by that label, made, sanctified and pure to the point that it can't violate a state's tort laws. And it can, and in ours, the law is risk versus utility. And they haven't removed that under their -- the way they're selling that product, and the way that

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product was designed in 1989 when Joe Nunnally died, the risk utility test was still applicable. And if this jury finds that despite their arguments, and

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their experts and all their body of evidence that the risk of that product far outweighed the utility of it, that we're entitled to a verdict.

And the negligence part of it goes without saying, particularly the six years that the negligence law or the years they're saying this law is preemptive didn't even exist. I think that pretty much -- I have another paragraph from the "Wilkes" case which is 1993, Mississippi Supreme Court case where Judge Bogan granted the partial summary judgment.

The Court reasoning follows, once again, the Court is called upon to decide the standard of tort liability by which manufacturer of cigarettes is held. The Court has considered the matter a new and concludes that cigarettes are as a matter of law defective and unreasonably dangerous for human consumption. Cigarettes are defective because when used as intended they cause cancer, emphysema, heart disease and illness. That the results reached here imposes absolute liability on the manufacturer of cigarettes for injuries arising from the use of their products is not a departure from the this doctrine strict liability. Rather the logical extension of the doctrine of present day scientific

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and medical knowledge, and the enormous economic burden which cigarettes place on the nation's economy and its health care system in particular.

Again, Your Honor, we are asking that nothing be done other than apply the State's normal product liability law which is the risk utility doctrine when this case is brought and the laws of negligence concerning what they did or failed to do particularly to the period prior to any exemption possibilities existing.

JUDGE CARLSON: Mr. Alden? Anything on that point?

MR. ALDEN: Yes, sir, Your Honor. We have several responses to what Mr. Merkel just said. First of all, Mr. -- Mr. Merkel talks about how the Labeling Act was enacted in 1966. Actually, that's when the warnings went on. But what he ignores is they can't prove a pre '66 claim. Their own expert, Dr. Burns, said that if Mr. Nunnally had chosen to quit smoking in 1978, which was about 10 years after the Labeling Act first had preemptive effect according to "Cippolone", he could not say to a reasonable degree of medical certainty he would have contracted this illness.

So I would submit if the only thing

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they're trying to carve out here is pre '66 claim, that claim fails for an independent reason. They can not show casual connection between any of his pre '66 smoking and his injury. Because their own expert told you if he quit much, much later in 1978 he couldn't say to a reasonable medical certainty, he would have contracted cancer.

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Mr. Merkel's main argument about preemption is that the Labeling act was just about labeling. That's simply wrong. The Supreme Court tells you it's wrong. The Supreme Court says -- and Mr. Merkel also says well, cigarette's aren't any different than any other cigarette because every cigarette is legal until they're made illegal. That's wrong. The Labeling Act says when we're talking about smoking and health, Congress has grabbed that area.

Congress has decided this is going to be an area in which we are going to regulate. Congress has said we're going to give warnings, but provided that our required warnings are given, we're going to permit the sale of this product, and we're not going to allow health-based regulations by state tort laws.

And Mr. Merkel's statement that it's just

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a Labeling Act and it's just about cigarette labeling is wrong. The Supreme Court and the FDA opinion tells you so. "Congress foreclosed removal of tobacco products from the market. Congress has directly addressed the problem of tobacco and health through legislation on six occasions. Congress stopped well short of ordering a ban. Congress -- a ban of tobacco products would plainly contradict Congressional policy."

Cigarettes are different. They are a product, that at least when you're talking about health-based state obligations are different. We have four cigarettes, unlike to my knowledge, most other products, perhaps any other products, a statute which Congress says these things are legal. And you can't put health-based limits on the mere sale of them. So I would submit that Mr. Merkel is just wrong when he says that it's just a Labeling Act. That may be in the title. But if you look at what Congress -- what the Supreme Court says Congress was doing, they've told you that they did a lot more. They've made it a legal product. Cigarettes are different.

Mr. Merkel also talked about "Horton" and "Wilkes." At least from what I heard, he read from

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the "Horton" decision is exactly my point. He talked about how they had found a defect in the cigarettes. The defect, I think, was nicotine spiking in addition to contaminants. But both the dissenting Justices says these are truly defective cigarettes. They did find cigarettes are a really bad thing, they have a lot of health consequences, but they were not merely talking about cigarettes in the abstract. They were talking about cigarettes in that case where that Plaintiff had shown a real defect, unlike what it is here.

Next Mr. Merkel said that well, we're not really saying that there's a tort duty not to sell them. They can merely charge a lot more, and then pay -- pay in something like an insurance scheme. Well, that's exactly the argument that I told you he was going to make, and he did.

What they're saying is that there's a

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tort duty, and when you violate the tort duty, well, then it's just go -- go pay compensation. Our tort duty isn't really something you have to pay attention to, and we can attach all these kind of limits to our tort duty. That's just wrong.

That's what the Supreme Court told you in "Cippolone" and "Guyer." "Guyer" says when we're

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analyzing a statute for purposes of preemption, you have to assume compliance with the statute. The duty here -- with the state tort law duty you're looking at. The duty here is a duty that merely by selling ordinary cigarettes, cigarettes that couldn't be made any safer, cigarettes that are manufactured correctly, cigarettes that don't have any warning defect, merely by doing that, you're violating Mississippi's law. That's a duty not to sell them.

Next Mr. Merkel told you about some California and Florida cases. I would submit that if you look at those cases, not one of those cases involved this kind of claim. If you look at the cases that have gone for the Plaintiff out in California, each one has involved either a warning claim, has involved a fraud claim or has involved a true design defect claim.

Certainly for the "Ingalls" case that is going forward in Florida, there are real claims there. Those claims I'm not telling you are preempted, or they may be preempted in different ways. The claim here is a unique claim. They're about the only people other then the "Wilkes" Plaintiff who have made this claim. I believe he

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said it was from the Supreme Court. I think, it was actually for the trial court. Anyway, I'm not denying that the "Wilkes" trial court found absolute liability. But what I am telling you is the "Wilkes" trial Court had absolutely no Mississippi support for that. The California Court it cited was wrong. It didn't stand for that.

In fact, he ignored a subsequent California Supreme Court decision who said wait a minute, California doesn't have absolute liability. And when "Wilkes" went to the Mississippi Supreme Court for a Defendants verdict, the Supreme Court did not talk about a defect of this kind of claim. It didn't address it. Similarly important. There's no discussion about the preemptive effect of the Labeling Act on this kind of claim. Obviously in "Horton" there was no claim like this. We would submit that this claim is preempted. Thank you, Your Honor.

JUDGE CARLSON: Go ahead and take them point by point, and I'll take a recess and go back and look at all the motions.

MR. ALDEN: I guess it's my turn again. Your Honor, I'll try to cut this a little bit short, because it's somewhat redundant.

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JUDGE CARLSON: Okay.

MR. ALDEN: Our alternative legal ground, and again, it's our fault we didn't move for summary

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judgment, and I in no way fault the Court. Plaintiffs are asking you to do something extraordinary. There's one other court that has done it, that's the "Wilkes" Court that has tried to find liability on this kind of claim that has gone anyway anywhere. The "Wilkes" Court did it, and I've told you already in the context of preemption where the "Wilkes" Court was wrong.

The "Horton" Court didn't do it. That was not what was before the Supreme Court in "Horton", and the Court didn't say this kind of claim exist as a matter of law. Now, there's a reason this kind of claim didn't exist. What you really have here is they're asking this jury to engage in a legislative function. They're asking this jury to say that cigarettes are too dangerous to sell in Mississippi. And that if you sell cigarettes in Mississippi, you are subject to absolute liability.

Bodies of government can do that, but that body of government is the Legislature, it's not the judiciary. And that's what court after court

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after court has said. A lot of cases involving these type of claims come up with handguns. In the context of the handgun, the 7th Circuit Court said in "Martin versus Herrington and Richardson" in 1984 that absolute liability "would produce a handgun -- handgun ban by judicial fiat." "Such a policy ought to be adopted by the Legislature not to be the imposed by judicial decree." It's been said in the context of cigarette cases, the Texas Supreme Court, "American Tobacco Company versus Grenell," had this kind of claim before it. What the Texas Supreme Court said categorical liability is not only an unworkable solution but also a solution repeatedly rejected boy the courts. Nobody adopts this theory. And the reason they don't adopt it, and we don't think Mississippi would adopt it outside of Washington County, it's a defectless product claim. To have a product claim, you have to have something wrong with the product first. Before you get to the "Prestage" risk utility factors, you can't just evaluate every product in the abstract. There has to be something wrong with it. You need a manufacturing defect. You need a warning defect. You need a design defect.

Here they -- the one claim they have

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alive is a negligence and strict liability design defect claim. But that design defect claim, as I explained before, isn't like any other design defect claim that you see. It's a design defect claim that says well, there's nothing you can do to this product to make it safe. There's nothing that we can show you that Reynolds could have done short of not selling this product that would have prevented Mr. Nunnally's injury. So it's a defectless design defect claim.

And I would submit that no Court has recognized that, and if you look at the Mississippi cases as we collect a whole bunch of -- as many as we could find in the weekend in a footnote on our

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brief, you cannot find or I submit that you cannot find a Mississippi case where they submitted a design defect claim of this type to a jury. If you look at every one of the design defect cases in Mississippi, except for "Wilkes", they all involve some kind of alternative design that the Plaintiff alleged would have prevented the Plaintiffs' injury. Which is another way of saying you can't have a defect -- you can't have a claim in product liability without having a defect. Mississippi's law is no different than the law everywhere else.

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That's the -- and that's really basic to the restatement. The second restatement, which I think is prestatute, what we have here, it requires a product to be defective and unreasonably dangerous, not defective or unreasonably dangerous. Sure under "Prestage" you have a risk utility balance. But you have to have a defect before you get to the unreasonably dangerous balance that you do in "Prestage." You need a defect.

That's what the third restatement of torts, which is adopted two years ago, they do not recognize this kind of claim. And I would submit that the third restatement of torts is very instructive where the American law is going. They reject it. When they talk about a design defect claim, they define it by having an alternative design. When they define it in section 2 of the third restatement, they say here's a warning claim, here's a manufacturing claim, here's a design claim. A design claim is, by definition, a claim that has a real alternative. Because a design claim without an alternative is just absolute liability which is what we have here.

Now, courts considering cigarette cases have been presented with claims like this, and they

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get dismissed. As the First Circuit said in "Cautler" in 1990, "the existence of a safer alternative design is a sine qua non for imposition of liability in design defect cases. You can't go to a jury in a product case without a product defect. They don't have a defect, because their design defect claim has no defect. It's merely that all cigarettes, no matter how designed, are too dangerous to sell. That's not a defect, and that doesn't get recognized in Mississippi law.

JUDGE CARLSON: Mr. Merkel.

MR. MERKEL: Your Honor, the biggest difference in Mississippi law and any other law he may be relying on is we have adopted in "Prestage", and this is the only case that has come up between the time the "Prestage" Court put down the risk utility test as being the deciding point in a product liability case and the time that the new statute was enacted, which has slightly different legal context.

But under a risk utility test, we're not required to prove anything about another design that would have been safer. We're not -- all we're saying is that the cigarette, as they the designed it from 1960 to 1966, and then subsequently from '66

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to '89, has no utility, and it has tremendous risks. So under the risk utility doctrine, it is unreasonably dangerous, and it is defective by that. The two go hand in glove defective and unreasonably dangerous are both decided by the risk utility test.

As far as we know, there is no way to make a tobacco product that's going to burn tobacco safe. We don't have an alternative design to give to them. And as they've told the jury in their opening statement, and as you're going to hear a lot more in the following part of this, they can make a cigarette that does not burn tobacco. It just heats it, causes smoke without the fire, and the effect of fire on forming tar and things of that nature. Nobody wants the thing. They don't have any market for it, but it would remove the problems here.

And there's nothing in any law that says that they have a right to continue to sell a dangerous product just because they can't find a better way to make the product. That's the most absurd thing I've ever heard of, that yeah, we know it's dangerous, yeah, we know we can't fix it. We don't want to fix it. Because if we fixed it, nobody would use it or want it, and therefore, with impunity, we can continue to sell it. And

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notwithstanding Mississippi law and the risk utility analysis, there's no way that a Plaintiff can make out a case here, because they can't show a safe way we can do it, either.

No one, Your Honor, has a right to sell a dangerous product simply because they say it can't be made any safer. That's not what the law is. The law is they're under a duty to market a product that is reasonably safe for use in its intended fashion. And that burden is on them to show that jury that this thing has more utility than it does risk. That in some way it should not be subject to liability under the risk utility test. And there's nothing in "Horton" or nothing in "Wilkes" that says otherwise. Those cases simply applied if "Horton" law as it existed, and Judge Bogan found that under the risk utility analysis these products were unreasonably dangerous.

You're not doing that. We've made that motion, and you overruled our motion. But if this jury so concludes, then we're entitled to the a verdict, and from a standpoint of negligence again, Your Honor, there is no -- none of this is applicable to the first six years of this lawsuit. And counsel's argument where we could have quit in

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somewhere else, that goes to their claim of comparative negligence and assumption of risk. Maybe we could, maybe we couldn't, that's their burden of proof. But we started during a six-year period where there were no warnings, there was no preemption, there was nothing. We were misled by the absence of information given by this industry into commencing smoking. An act which they knew was addictive, an act which they knew would make it extremely difficult to quit.

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So at that point, it simply becomes a weighing and balancing of the jury, whose fault is it? They set us into this pattern of smoking, they caused us to become addicted, foreseeably caused us to do that, and should we be held responsible for not quitting at some point? That's up to them to prove to the jury. That's not our burden of proof. Our burden of proof is that we were -- that they marketed the products negligently during that particular period of time. And in straight proximate cause, continuing fashion, we continued to smoke exactly as they anticipated, predicted and relied on that we would do. And when we didn't quit, we ultimately were killed by cancer, again, in a foreseeable fashion. So that issue they can

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argue, but that's a jury argument.

That's not something that's a matter of summary judgment or directed verdict for the Court to determine that we should have quit at some point in time. And had we quit at that point in time, we might have been saved. So again, I don't think there's any -- any relationship of that.

The FDA case that they keep talking about was an outright attempt by the Food and Drug Administration to ban smoking. And that does fly in the face of whatever Congress did with its Labeling Act, but that's not what Mississippi tort law is doing. What we're doing is applying long recognized standing tort law to determine whether a product is unreasonably dangerous and defective or defective as -- as it is being sold and marketed. And that's -- that's all this case is about. It's not trying to ban anything.

MR. ALDEN: Your Honor, I have a couple of responses. First of all, I think Mr. Merkel is addressing both these motions. Because at the end, at least, he was talking about preemption. I'd like to go back to the state law, and I really don't have much to say. Mr. Merkel talks about how you determine defect and unreasonably dangerous under

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"Prestage" under risk utility factor.

That's just wrong. If you look at "Prestage", what they said was "Prestage" determines -- the risk utility balance determines whether it is unreasonably dangerous. But there are two requirements under Mississippi law which is Section 402A prior to the statute. The two requirements are defect and unreasonably dangerous. And I would submit that you cannot find a design defect claim in Mississippi other than the "Wilkes" case where they allow a defect claim -- a design defect claim to go forward without at least a possible alternative design.

Because really, when you're talking about a design claim that says the inherent dangers of the product are so much that just selling it is a violation of tort duty, what you have is a tort ban on the product. Mr. Merkel also talked about how you have an obligation to make your product reasonably safe. Well, if they could show we could have made it safer, they would have had a claim. If

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they can show that there's some way that there was an alternative design that would have prevented Mr. Nunnally's injury, that if we'd adopted would have prevented his injury, that's a claim.

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We're not arguing about that, but that's something they don't have here. Also, if there are dangers, you can warn about them, and there are such things as warning claims, but we don't have those, either. Instead what we have is this bastardized design defect claim which is trying to shoehorn absolute liability into the principles of design defect. It just doesn't fit.

Court after court has said that. There are no Mississippi cases, other than "Wilkes" in the trial court alone that say you can take a design defect claim to the jury without any evidence that any other design would have prevented the injury. There just are none. Now, at the end of his argument, Mr. Merkel went back to the preemptions, so I guess I'd like to address what he said there.

First of all, he said that so long as he start during the first six years, they still have some kind of claim. Well, first of all, the claim would have to be that cigarettes sold during the time we were violating the tort duty, which would have to be 1960 to '66 based on the only evidence I see somehow caused his injury.

Because clearly, if you were imposing it based upon the cigarettes sold after '66, you would

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have -- that's when the claim would be preempted, assuming I'm right, which I think for the purposes of argument, Mr. Merkel was. We have definitive testimony from their own experts saying they can't prove that the cigarettes he smoked before 1966 had anything to do with the lung cancer he got in 1988. Because their -- their own expert said had he quit in '78, I can't say to a reasonable degree of medical certainty he would have gotten sick in '88.

Now, Mr. Merkel also said that it was somehow different what was dealt with in the FDA opinion than what we have here. It just wasn't. In the FDA opinion, they were saying can the FDA impose a ban on cigarettes? And they said no. The Labeling Act for this product says no. Obviously for a whole lot of other products that don't have a Labeling Act, the FDA could. But for this one product, because of the Labeling Act, it conflicts. Congress has said no, you can't have a ban.

Well, that's exactly what this tort duty is. Other tort duties like a tort duty to warn or a tort duty to market a feasible alternative design or a tort duty not to have a rotten toe in a cigarette, all of those which would be a manufacturing defect, none of those are preempted except a warning claim

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after '69, none of those are preempted in the same way that this claim is. It's the very uniqueness of this claim that make it preemptive. This claim is a ban claim. Because they are giving us no alternative other than not selling cigarettes in Mississippi. Should I just go on to my next motion?

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JUDGE CARLSON: Let me --
MR. ALDEN: Okay, Your Honor, just to let you know where I'm going, because a lot of times I know and other people don't. I've so far attempted to deal with preemption. And I've attempted to deal with our second brief which said there was no claim as a matter of state law. Our fourth brief, which deals with they're failure to prove unreasonably dangerous, I think, we are going to submit on the briefs if that's okay with the Court.
JUDGE CARLSON: All right.
MR. ALDEN: Which leaves only one last remaining motion which, frankly, is a fairly simple one. And maybe even I will be short with it.
Plaintiff has in our view one remaining claim. It's a design defect claim. It's stated under negligence and strict liability theories. But they're based on the same claim in the sense they're based on design defect. We've heard reference

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throughout Plaintiffs' counsel's opening statement, and I think when we were negotiating about the pretrial order that they somehow have a negligent marketing claim. There is no such thing as a negligent marketing claim as distinct from a warning claim. Because there are only three kinds of tort products you can have. You can have a warning claim, manufacturing claim, you can have a design defect claim. There's no such thing as a marketing claim. A lot of states use the word "marketing" when they're referring to a manufacturing claim. It's no different. The cases we cite in our brief deal with that at length. All we ask of that motion is that Plaintiffs' counsel be barred from essentially reviving his failure to warn claim, it's already been dismissed, by just putting a new label on it and calling it a negligent marketing claim.
JUDGE CARLSON: Mr. Merkel.
MR. MERKEL: Your Honor, again, this part of the case goes back to the 1960 through '66 era, and there is no prohibition against attacking what was known or made known by the industry in particularly to this Defendant to the public. As Dr. Burns testified at each point when a scientific study was released condemning tobacco as the cause

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of lung cancer and other diseases, instead of simply coming out and saying yes, that's right, limit your use, cut down in your use, try to quit if you can or whatever, this industry to the contrary, created, and we heard that today from Dr. Teague's deposition, they created the appearance of a question. We've learned that from what their CEO's told the public, told Congress.
They created and preserved or 30 years the appearance of an open question, and that is what is defective. That's negligence. That's not under any of the strict liability theories. That's just garden variety of negligence that the Defendant, in this particular instance, was negligent for the information that it made available to the public. From the creation or the appearance of a controversy, when, in fact, none truly existed. For

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its withholding from the scientific community of the identity and nature of carcinogenic -- carcinogens in tobacco smoke and tar which we've heard testified to by Dr. Burns and also seen in their internal memos, those of Dr. Rodgman. So that's what we're talking about, negligent marketing.

What they did with regard to creating the knowledge of the public that was going to be

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decisive in whether a person undertook to smoke or did not undertake smoking. They created a question and appearance that there was nothing wrong with it. And that is a negligent act on their part. Dr. Burns has so testified.

What Mr. Nunnally did about that, they urge, is negligence on his part. And to put that into context and allow a jury to view the arena which Joe Nunnally was making a decision to smoke or not to smoke, we have to know what the real body of knowledge was and what the apparent body of knowledge was based on what the cigarette industry did.

And there's no question that for six years there they stymied the -- well, the Surgeon General didn't even come out with a report until 1964 because of their adamant position from 1953 to 1964 that there was an open-ended question here, nothing had been proven. There was no reason for the public, or Congress or anybody else to believe that cigarette smoking had been proven to cause cancer.

Those are simply negligent acts of a manufacturer. And that's what we mean by negligent marketing claim. It's not a failure to warn in the

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sense that we're trying to say misrepresentation or fraud. Because we can't prove exactly which one of these he saw, because he's now dead.

We can't make a fraud or a misrepresentation count. And that we've conceded long since. But their acts and their intentionally creating an appearance for him to act on is negligence which foreseeably would cause the public, which he's a member of, to continue smoking, to take up smoking, which they know is addictive again, foreseeably. And that the addiction, I believe 94 percent of the people that start do not stop until they're in their 60s. So that addiction is a foreseeable part of the whole equation.

If they could get the public, including Joe Nunnally, to begin smoking, they knew that they had a more than -- a more than possible, they had a very probable result that those people were going to continue to smoke on into their later years. And this is what we're talking about in the manner in which these things -- this company negligently marketed its products.

JUDGE CARLSON: Mr. Alden.

MR. ALDEN: Your Honor, I think for once I agree with Mr. Merkel, that you could have a

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claim, pre '66 or post '66 about what we should have told the public. That would be a warning claim.

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They had that claim, but that claim was dismissed. You could have a claim that we perpetrated some awful fraud on the public, pre '66, post '66. They had that claim. That claim was dismissed. Notwithstanding the dismissal of the claims that embodied the very things that he said, they're still trying to bring the claim which, I guess, is really our point.

There is such a thing as -- all the things he talks about were in their case. They were in their fraud claim, they were in their conspiracy claim. They were in their warning claim. Those are all gone. What we have left, because there are no warning claims, there are no fraud claims, and there are no conspiracy claims, is merely a design claim. And a design claim does not have everything else built back into it as Mr. Merkel wants it to.

You cannot just have this free floating amorphus negligence claim. It has to be tied in a product liability case to something. And the something has to be manufacturing defect, warning defect, design defect. They've the had all those -- the warning defect is gone. The manufacturing was

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never here. And the design defect is now very narrowly confined to should you have sold it or shouldn't you have sold it. There is no free floating negligence marketing claim left. That's what we say in our brief on that, and I submitted it on a brief.

JUDGE CARLSON: Let me step down now and consider these motions, and I'll be back out shortly with the rulings. Let's take a recess here.

MR. ALDEN: Thank you, Your Honor.

(A short break was taken.)

JUDGE CARLSON: I considered all the motions, and of course, the lawyers are well aware of the standard the Court has to apply in considering the motions at this stage of the proceedings, that being basically the Court has to consider the evidence, as well as all reasonable inferences which may be drawn from the evidence and consider these motions in that light.

And so considering, applying that standard and the Plaintiff being the nonmoving party, then the Court feels compelled as a matter of law to deny all the motions and allow the case to go forward on these issues. And the the Court does not make these rulings flippantly. But after looking at

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the status of the record to this point, the Court feels compelled to make those rulings. So we'll go forward in the morning. Let's make sure about time and knowing that the witnesses are coming in. Will there be a witness ready at 8:30?

MR. LISTON: Yes, sir.

JUDGE CARLSON: That to be the case, let's stop here and go forward at 8:30.

(Time Noted: 4:04 p.m.)

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